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THE PRIME MINISTER'S POLICE? COMMISSIONER HUGHES' APEC REPORT[©]

BY W. WESLEY PUE*

I. INTRODUCTION	165
II. POLICE MATTER	166
III. THE HUGHES INQUIRY: THE PARTICULAR ALLEGATIONS	168
A. "On the evidence before me"	169
B. Individual Police Officers	172
C. Violations of Constitutionally Protected Rights	173
D. Political Interference	175
IV. CONCLUSIONS	181

I. INTRODUCTION

On 31 July 2001, a distinguished Canadian jurist reported on matters of unusual significance. Sitting as a Member of the Commission for Public Complaints Against the RCMP¹ (CPC), Mr. Justice E.N. Hughes dealt with matters that go to the heart of liberal democracy.

Any investigation of alleged police misconduct is important, of course, to a country that wishes to be governed in accordance with fundamental principles of the rule of law. This is so even in the seemingly most inconsequential instances. Important principles are involved even where "small" matters are concerned. The matters before Commissioner

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¹ This is now the correct name for the body which, at the time of Mr. Justice Hughes' appointment, was known as the RCMP Public Complaints Commission. The body was renamed effective 1 January 2001 in order to emphasize that "the Commission is an independent agency and is not part of the RCMP." (*Reclaiming Our Vision*, Annual Report, Commission for Public Complaints Against the RCMP, Minister of Public Works and Government Services, June 2001, at 14).

Hughes on this occasion however raise a number of large issues that only rarely come before formal inquiries.

The matter known in Canada as “the APEC affair,” and Commissioner Hughes’ APEC report (“Hughes Report”) focus on allegations of wrongdoing by the police and the Prime Minister of Canada at the Asia Pacific Economic Co-operation (APEC) Conference held in Vancouver in November 1997.² The particular allegations, which have dominated the House of Commons and Canadian political life on several occasions, will be addressed in a moment.

First, however, it is worth pausing briefly to consider some fundamental principles concerning police and politicians.

II. POLICE MATTER

Canadians tend to be strongly supportive of their police. Police officers have an obviously difficult job that involves them in many difficult, unpleasant, and even dangerous duties. They are the individuals to whom we look first when property losses or accidents occur or when danger threatens. Their role in law enforcement and in preserving “peace, order, and good government” is widely appreciated. The police officer as “helper” is an image that most of us accept. Most Canadians teach their children to turn to police officers for help when they need it.

Images of “police as helpers” have remarkable strength. They are so strong, in fact, that they often obscure another equally important aspect of policing. Police may be helpers, but they also constitute a highly organized, armed force. As such, they are dangerous. Most of their important operational decisions are made in secret, invisibly, beyond public scrutiny. They exercise immense discretion in deciding when, how, and against whom to apply the law (think of the last time you were caught speeding). Their power is naked. It includes surveillance, use of force, handcuffing, arrest, and confinement. Only rarely, however, is police power subjected to critical scrutiny.

² The APEC affair is discussed in W.W. Pue, ed., *Pepper in Our Eyes: The APEC Affair* (Vancouver: University of British Columbia Press, 2000) [hereinafter *Pepper*]. The full name for the Hughes Report is Commission for Public Complaints Against the RCMP, *RCMP Act – Part VII Subsection 45.45(14), Commission Interim Report Following a Public Hearing Into the Complaints regarding the events that took place in connection with demonstrations during the Asia Pacific Economic Cooperation Conference in Vancouver, B.C., in November 1997 at the UBC Campus and Richmond detachments of the RCMP* (Ottawa: CPC RCMP, 31 July 2001).

Another image is helpful here, if only to import some balance into our thinking. Imagining police officers as “bureaucrats with guns” might conjure up rather different public perceptions. Such an image opens a *partially* accurate alternative insight. Hidden power is dangerous and people who carry guns to work are certainly powerful. The point is not that individual cops (or bureaucrats) are “bad” but only that there is an important aspect of their job that we need to think about. The difference between “bureaucrats with guns” and law enforcement officers is simple: police are supposed to be prohibited equally from pursuit of their own desires and from acting on the whim of politicians. Unlike civil servants, they are not supposed to respond to “political masters.” Their job, simply, is to enforce the law.

The difference between these two alternative views—each captures important aspects of a larger truth—is crucially important. Significant deviation in the direction of either the pursuit of police officers’ interests or taking orders from politicians is a prescription for lawlessness, a harbinger of a “police state.” Consider, for example, the treatment meted out by President Mugabe’s police in Zimbabwe:

Simon Rhodes, a tourism consultant who has lived in Zimbabwe since 1977, is the son of Margaret Rhodes, 74, first cousin of the queen.

Mr. Rhodes was walking to his car when two policemen grabbed him from behind. He said he was thrown into the back of a Land Rover “in an extremely violent manner” and assaulted by four policemen.

“One constable twisted both my arms behind my back and a sergeant repeatedly punched me in the throat. Another one hit me on the side of the head.”

Before being freed, Mr. Rhodes asked the inspector whether the role of the police was to protect all Zimbabwean citizens. “He told me, ‘No, Mr. Rhodes, we are here to protect the interests of the government.’ That was a very revealing comment.”³

This example points to the importance of police and politicians alike internalizing a view of the policing role that is compatible with liberal democracy. It is entirely unacceptable for either to come to see the job of police as being to “protect the interests of the government”. The police, in the common law tradition, are to be “citizen police,” respectful of the

³ David Blair, “Observers see Zimbabwe clashes as forerunner to civil war Fight for democracy” *The Daily Telegraph*, with files from Agence France-Presse [printed in *National Post* 3 April 2000].

public of which they are part, obedient only to the law, and not agents of partisan politics.⁴

III. THE HUGHES INQUIRY: THE PARTICULAR ALLEGATIONS

Because of the importance of these matters, the incidents falling within Commissioner Hughes' purview register significantly in Canadian constitutionalism. Reduced to a nutshell, the allegations he was called upon to investigate fell into three categories:

- (1) allegations of improper or even criminal actions by individual police officers (wrongful arrests, unnecessary roughness, gratuitous use of pepper spray, police dogs, improper strip-searches, use of pepper spray as punishment, and so on);
- (2) allegations that the police wrongfully attempted to buffer visiting dignitaries from the sight or sound of peaceful demonstrations, in so doing, violating fundamental rights of Canadians including freedom of speech, freedom of association or assembly, freedom of movement, and so on.
- (3) allegations that the police did all or some of these things in direct response to wrongful orders from the Prime Minister's Office. (It was alleged in the hearings and in the media, the House of Commons, and elsewhere, that these orders originated from Prime Minister Chrétien himself. Commissioner Hughes, however, had no jurisdiction to investigate the Prime Minister's conduct as such. Consequently, this intriguing, supremely important, question was never "before" the Commission⁵ and has not been dealt with in any forum.)

Commissioner Hughes' inquiry had limited jurisdiction, limited resources, and limited fact-finding ability. Nonetheless, he conclusively found each of these central allegations proved. The report documents several cases of improper conduct by individual officers. Hughes also found

⁴ For a discussion of "citizen police" see Don Sorochan, "The APEC Protest, the Rule of Law, and Civilian Oversight of Canada's National Police Force" in *Pepper supra* note 2, 57 at 62. Allied concepts and issues are explored in P.C. Stenning, "Someone to Watch over Me: Government Supervision of the RCMP" in *Pepper, ibid.* at 87.

⁵ This jurisdictional issue is discussed in W. Wesley Pue, "Executive Accountability and the APEC Inquiry: Comment on 'Ruling on Applications to Call Additional Government Witnesses'" (2000) 34 *U.B.C.L. Rev.* 335 [hereinafter "Executive Accountability"].

that police officers did on occasion improperly seek to inhibit the exercise of constitutional rights by Canadians in order to protect the sensibilities, not the personal security, of visiting dignitaries.

Most stunning, though, is the finding that the Prime Minister's Office had engaged in two instances of "improper involvement in the RCMP security operation" and that the police had "succumbed to government influence and intrusion in an area where such influence and intrusion were inappropriate."⁶ This is the first such authoritative finding of wrongful interference with the police on the part of any Canadian prime minister or his or her office.⁷

A few comments are in order with respect to each of the principal matters. All of this needs to be understood against the background of the evidentiary and jurisdictional limitations within which Commissioner Hughes operated.

A. "*On the evidence before me*"

It would be entirely inappropriate for any judicial officer to draw conclusions not fully supported by the evidence. Commissioner Hughes was especially careful not to draw inferences that were not conclusively justified on the basis of evidence before him. Fact-findings throughout are cautiously drawn. Commissioner Hughes' report is liberally sprinkled with findings of fact qualified by the phrase "on the evidence before me," or its equivalent, such words serving as constant reminder of the limitations of the particular inquiry process.

In this case the Commission's ability to probe the facts was inhibited in four ways. First, much important evidence was solely in the hands of a federal government determined to shield potentially damaging evidence from scrutiny. Claims of "privilege" or allied doctrines were frequently made during the hearings and the Commission proved powerless to compel the production of documents or other evidence when "privilege" was invoked. Given that the substance of the APEC allegations focused on the conduct of the prime minister and his senior staff, this was akin to giving the fox the key to the henhouse.

⁶ Hughes Report, *supra* note 2 at 438.

⁷ There are other instances in which other observers have suspected some such thing and, a few times, allegations of this sort have been raised seriously and with some credible evidence in support. (See Stenning, *supra* note 4 for examples). Nonetheless, the Hughes Report, *ibid.*, is the first time any authoritative tribunal has found political interference with the police to have in fact occurred.

Second, Commissioner Hughes acted without advice of independent counsel. The lawyers who appear as "Commission Counsel" in CPC hearings are, in fact, employees of the CPC. They work for the Chair of the Commission and she in turn is appointed by Order-in-Council. The more direct terminology for such an appointment is that this is a "political appointment" made by the Privy Council Office on behalf of the prime minister.⁸ There are two problems with this arrangement. First, as the British Columbia Civil Liberties Association's brief pointed out, there is at least an apparent conflict of interest where "the Prime Minister, to whom the Chair ultimately owes her job, has a direct and personal interest in the outcome of the proceedings."⁹ Equally important are the practical implications for the Commissioner hearing the matter. "Commission counsel" are, in fact, lawyers working for an Ottawa bureaucracy, not, as one might properly expect, independent counsel answerable only to the tribunal Chair. The only truly independent member of the inquiry staff was the Commissioner, who confronted a daunting task in this complex, multi-layered case that involved 170 days of hearings, 153 witnesses, 710 exhibits, and over forty thousand pages of testimony.

Third, if Commissioner Hughes suffered from limited resources, he also suffered from a limited power to obtain evidence. This made it practically impossible to seek out any information that was not voluntarily disclosed. In this case almost all germane evidence lay in the hands of the Government of Canada or the RCMP,¹⁰ producing a fundamental, pervasive skewing of information. There was no evidentiary "level playing field." Every lawyer knows that a good part of the litigation "game" lies in filtering the evidence that will appear before the fact-finder. We can assume that Ottawa's lawyers were astute enough to prevent the introduction of evidence damaging to their clients. Moreover, the Crown (i.e. the prime minister and executive branch) enjoys special privileges to exclude

⁸ This is a reasonably accurate description of the functioning of government in Canada though not, perhaps, the way the thing works in theory. See D.J. Savoie, *Governing from the Centre: The Concentration of Power in Canadian Politics* (Toronto: University of Toronto Press, 1999). Whether the Chair of the CPC RCMP is in fact susceptible to political pressures is, of course, another matter. See, however, the disturbing account provided by the first "APEC" panel chair: "Gerald M. Morin, Q.C., 'Personal Reflections on the Ill-Fated First APEC Inquiry' in *Pepper*, *supra* note 2.

⁹ Hughes Report, *supra* note 2 at 441.

¹⁰ Curiously, the two were never distinguished in the hearings, the RCMP as an institution being represented by Ivan Whitehall, Q.C., general counsel for the Government of Canada. There is an irony in this in the context of an inquiry which, in pith and substance, concerned allegations that the RCMP lacked sufficient independence.

evidence. In most cases these work effectively as an absolute bar to information, a trump card.

The Hughes Commission was powerless in situations where evidence went missing. Whereas the Somalia Inquiry, for example, had been able to pursue missing documents quite aggressively,¹¹ the CPC is incapable of following even apparently important evidentiary leads. Not all inquiries are created equal. Thus, for example, the Commission was unable to pursue the matter when Jean Carle, then the Prime Minister's Director of Operations announced that he had shredded relevant documents.¹² Similarly, a RCMP source told the *National Post* newspaper that tapes of police radio transmissions "punctuated with 'Jean Carle wants this' and 'Jean Carle wants that'" had gone missing.¹³ The Hughes Commission, lacking genuine investigative powers or resources, was entirely dependent on the very people whose conduct was called into question for the production of evidence. Official Ottawa is notorious for its hostility to freedom of information.¹⁴ Even assuming the utmost integrity, good faith, and public spiritedness on the part of everyone involved, the Commission's dependence on federal employees to allocate their time, their resources, and their energy to the mission of finding and disclosing evidence that might damage them or their "bosses" is remarkable.

Finally, it needs to be noted that the parties appearing before Commissioner Hughes were anything but equal. The adversary system is premised on the notion that two opponents, each seeking victory, will each muster the best evidence available. When two opposed parties present their best evidence to the adjudicator, so the theory goes, all relevant evidence will come out, allowing an impartial adjudicator to find the truth. In this case, however, the litigation teams were anything but equal. For all practical purposes the combined RCMP-Government of Canada team enjoyed unlimited access to lawyers, background research and preparation,

¹¹ See P. Desbarats, *Somalia Cover-up: A Commissioner's Journal* (Toronto: McClelland & Stewart, 1997).

¹² This matter was pursued without effect by lawyers for complainants during the APEC hearings. The destruction of documents was recorded on Parliamentary record by Alexa McDonough, leader of the New Democratic Party on 24 September 1998: "Today we learned that former operations director, Jean Carle, has admitted to destroying documents pertaining to Spray-PEC": online, Hansard <http://www.parl.gc.ca/36/1/parlbus/chambus/house/debates/125_1998-09-24/han125_1425-e.htm> (date accessed: 14 September 2001).

¹³ *National Post*, 28 August 1999.

¹⁴ See Office of the Information Commissioner of Canada, *Annual Report 2000-2001* <<http://www.infocom.gc.ca/reports/2000-2001t-e.asp>> (date accessed: 14 September 2001).

and resources. The complainants, on the other hand, were represented by a few lawyers whose backup resources were distinctly limited. Member of Parliament Jim Abbott aptly observed that this was equivalent to “a rowboat up against a battleship.”¹⁵

B. *Individual Police Officers*

The 1997 APEC conference was a significant event. It provoked one of the largest peaceful demonstrations in decades. A number of things went wrong, large numbers of demonstrators were arrested, and many complaints were lodged about the conduct of individual police officers. Two features about Commissioner Hughes’ approach to these matters are notable.

Commissioner Hughes took great pains, wherever he could, to avoid impugning individual RCMP officers.¹⁶ In several instances this produced findings that most lay readers would likely think overly forgiving of the police officers concerned. Hughes seems to have applied something like a criminal law burden of proof (beyond reasonable doubt) before finding against individual officers. Moreover, the evidence of protesters or complainants was not always treated as generously at that of police officers, leading to trenchant criticism of the report—one critic dismissed it, unfairly in my opinion, as one of the most expensive “doorstops” ever.¹⁷

A second point about the Commission and its report is important but has been much missed in subsequent public commentary. It is something that should be—but probably is not—obvious to all lawyers. Simply put, this was a *legal* proceeding, limited in its jurisdiction, bound by rules of evidence, and directed to improving the operation of the RCMP. The CPC is not in the business of finding fault, criminal responsibility, or liability as such. Commissioner Hughes was quite clear on this point, emphasizing:

¹⁵ Cited in *Pepper*, *supra* note 2 at XX.

¹⁶ This is especially important in the context in which a former Solicitor General had said he was providing “cover” for the Prime Minister and that part of the outcome would be that several individual Mounties would have to take a fall. See Affidavit of Dick Proctor, M.P., 4 November 1998 (filed with the RCMP Public Complaints Commission), online: <<http://www.tv.cbc.ca/national/pgminfo/apec/doc38a.html>> (date accessed: 10 September 2001).

¹⁷ I. Bailey & M. Higgins, “Report a big ‘doorstop,’ demonstrators say—Implementation doubted” *National Post*, with files from The Canadian Press <<http://www.nationalpost.com/search/story.html?f=/stories/20010807/638291.html&qs=jaggi%20singh>> (date accessed: 10 September 2001).

My jurisdiction is limited by the *RCMP Act* to making 'findings' and 'recommendations.' This Commission has no power to determine either civil or criminal liability on the part of anyone.

...

... I emphasize that the findings and recommendations made in this report cannot be taken as legal findings of criminal or civil liability.¹⁸

This cuts both ways. There may be incidents of police conduct judged to be "inappropriate" by Commissioner Hughes to which no criminal responsibility or civil liability attaches. Conversely, there were probably incidents in which the *evidence adduced* simply did not permit a clear "finding" of wrongdoing, even in instances where many informed observers—members of parliament, media commentators, complainants, and informed members of the public, for example—might "smell a rat." Judicial fact-finders simply are not empowered to "read" too much "between the lines." Law shuns a false positive. Not seeing a "rat" clearly in the evidence, a judicial fact-finder should not "find" as proved that a "rat" was present. But this does not prove the opposite either—that there in fact were no vermin lurking in the shadows.

Just as Hughes' critical assessments do not necessarily foreground criminal or civil fault, his exculpatory assessments do not preclude findings in other fora. Thus, for example, findings that a particular officer acted under great stress, or did otherwise blameworthy things for understandable reasons (such as lack of guidance or experience, having been put in an untenable situation as a result of political interference, improper command, poor organization, or other failures of senior officers) implies nothing about civil liability or even criminal wrongdoing. These are different issues. *No issue of civil fault or criminal wrongdoing was before Commissioner Hughes.* Just as acting under stress clearly does not excuse criminal conduct ("I was angry with my neighbour when I hit her"), so too unlawful superior command or "keystone cops" style organizational incompetence provides no shelter for police officers who do wrong.¹⁹

C. Violations of Constitutionally Protected Rights

The report is clear that the RCMP's organization of this major security operation in fact ran something like a "keystone cops" operation. Whatever else it showed, the APEC affair reflects poorly on the "brass" of

¹⁸ Hughes Report, *supra* note 2 at 4.

¹⁹ *Vancouver (City) Police Department v. British Columbia (Police Complaint Commissioner)*, [2001] B.C.J. No. 1405 at para. 20, online: QL (BCJ), per Justice Southin.

Canada's national police force. The organization was shown to be incompetent in all respects, ranging from defining a security perimeter to protecting it. Even straightforward, seemingly obvious, matters were not attended to. These included the stunning failure to provide an unobstructed exit route for APEC dignitaries and officials (the United States Secret Service must have been infuriated by this blooper), failure to arrange adequate detention facilities for law breakers in proximity to well-advertised demonstrations, failure to anticipate large numbers of peaceful demonstrators seeking "symbolic" arrest, and incompetence in drafting conditions for release. On the day of the summit, police officers with no authority showed up and assumed command responsibility, busloads of officers were carried *away* from where they were needed, crucial information (e.g. "these law-abiding demonstrators are fully cooperative with the police") was not communicated, and disinformation was acted on. The RCMP command left its officers open to improper pressure from the Prime Minister's Office and from the Chinese consulate.

But this policing debacle was not the least funny. The undeniable result of this comedy of errors was that substantial numbers of Canadians were roughed-up, interfered with, or arrested. The constitutional and citizenship rights of a number of law-abiding—or, at worst, modestly civilly-disobedient—citizens were infringed. These violations of individual rights by the RCMP were not trivial. One protester, Mr. Wolinetz, was pepper-sprayed directly²⁰ by a RCMP staff sergeant who was found not to be using "justifiable or appropriate" force in so doing.²¹ Wolinetz was then confined, handcuffed, and locked in a police van for some considerable time without adequate decontamination being provided. When assistance was sought the police officer in charge of the van apparently said something to the effect of "you got what you deserved."²² This is one "minor" incident of improper behaviour by the police that also violated individual rights. Here is how it was described by Mr. Wolinetz:

I was in extreme pain—I was soaked head to toe in the pepper spray; it was honestly one of the worst experiences of my life. I have been hurt playing numerous sports, I've broken bones. I've just recently had a major operation and none of it comes close to comparing to the—to the way the spray felt. My eyes were firmly shut, I couldn't see, my nose was just running and full of mucous and it just felt like my entire face and my ears were burning up; like the best analogy I can come up with is, I'd somehow gotten my face stuck on a hot

²⁰ Hughes Report, *supra* note 2 at 363.

²¹ *Ibid.* at 355.

²² *Ibid.* at 382.

burner, an element, and I couldn't peel it off. And during that time, I was hyperventilating, sobbing, screaming, kicking the door—basically just begging and pleading for somebody to help me, to make it stop.²³

There is nothing insignificant about this case or about other police violations of individual rights or police brutality.

Moreover, the reputation of the RCMP for competence, professionalism, and efficiency is seriously damaged. Commissioner Hughes found the Force had failed “to meet an acceptable and expected standard of competence, professionalism and proficiency in carrying out their duties.”²⁴

But, serious though these incidents are, they were not the crucial problem. Keystone cops incompetence is one thing, a police force that allows itself to be improperly deployed for political purposes—and politicians who see nothing wrong with so using the police—is quite another. It is to these matters, the core of the APEC affair, that I now turn.

D. Political Interference

Whatever the consequences, the evil flowing from “dumb cops,” “stressed” police officers, or keystone cops are, in principle, relatively easily remedied: better recruiting, better organization, better training, better staffing, better discipline, more effective civilian accountability, better commanding officers, and so on.

The problem presented by a police force that cannot resist improper political demands is not, however, so easily fixed. The APEC report revealed that the RCMP had allowed itself to be subjected to political influence on at least two occasions. True to form, Commissioner Hughes was *very* careful in coming to these conclusions. He refused to “connect the dots” in any instance (there were many) in which there was considerable but not entirely conclusive evidence of political meddling with the police.

One example of his extraordinary caution is shown in the way he approached a pattern of interference with of residents of the University of British Columbia's Green College, all of it resulting in the removal of their protest signs by police. On 22 November 1997, several days before the APEC leaders' summit, police officers seemed to have formed the impression that their job was to restrict freedom of expression at the site. Here is how

²³ *Ibid.* at 381.

²⁴ *Ibid.* at 102

Commissioner Hughes dealt with the matter of a protester's sign being removed against her will:

I accept Ms. Pearlston's evidence that an officer told her that the removal was due to orders from the Prime Minister's Office that there should be 'no signs and no people' on that side of the street. Both [Vancouver Police Department] and RCMP officers were present at the time but the officer who spoke to Ms. Pearlston was never identified. This evidence cannot, on its own, be relied upon as a basis for concluding that the Prime Minister had in fact ordered signs down.²⁵

Note the restrictions here. First, the evidence of an entirely improper and unlawful exercise of police authority was credible, but imperfect. Hughes accepted as fact that a police officer had said this to the witness. However, the officer could not be positively identified, making it unclear whether a RCMP officer or a Vancouver Police Department officer had uttered these words. Only on the former assumption would the matter have been within the CPC's jurisdiction. Secondly, the matter could not as a practical matter be pursued in order to find out who had uttered these words, or whether some such improper view of police officers' duties was widely shared amongst the police. There was no way for this tribunal to find out how many police officers thought of their duties in this way or how they might have come to this conclusion. Thus, the fact that Ms. Pearlston's signs were taken down and that she was threatened with arrest could only be treated as a case of a single "bad apple" or "stressed cop" making a dumb "mistake." Why the police officer invoked the Prime Minister's name, Commissioner Hughes could not say. Similarly, Commissioner Hughes refused to construe the subsequent removal of *all* protest signs from the Green College site on the day of the leaders' meeting as corroboration of the political interference the police officer who talked to Karen Pearlston had spoken of.

Lacking both jurisdiction and the practical means of seeking out further evidence, Commissioner Hughes found the explanation of this puzzling police conduct in the actions of blundering-but-generally-well-meaning police officers whose motivations were misunderstood by demonstrators who were confused as to what the police had told them about the removal of protest signs. Similarly, neither the removal of a Tibetan flag from a point where it would have been visible to the leaders nor the attempted enforcement of a "noise-free" zone compelled Commissioner Hughes to discern an invisible political hand stirring the

²⁵ *Ibid.* at 107.

police. Even when construed against the background of the Prime Minister's Office's insistence on creating a "retreat-like" atmosphere (an understandable though not a lawful objective), Commissioner Hughes would only go so far as to say that all this created the "appearance" of a crackdown on free speech. This is cautious fact-finding indeed. Some might consider it cautious to a fault.

Others, less careful about jurisdiction and evidentiary constraints would perhaps be more inclined to connect the dots, drawing the inferences these circumstances and others like them seem so clearly to point to. However, the judicial duty imposes constraints and only Commissioner Hughes heard all the evidence. It was not properly his purpose to draw inferences of political interference where the evidence (such as it was) allowed for alternative explanation. There would, simply, be no finding of political interference by Commissioner Hughes in any case in which a "keystone cops" explanation would suffice: Occam's razor was rigorously applied.

Noting the extraordinary caution in all matters of fact-finding, Hughes' conclusion that there were two clear instances of improper political interference with the police is stunning. His judiciousness in all respects renders his findings in this regard unassailable. Both instances involved interference by the prime minister's Director of Operations, Jean Carle, who was omnipresent in the days leading up to the APEC conference and on the day of the conference itself.²⁶ An *extremely* close personal friend of the Prime Minister, he held a pivotal position:

Jean Carle, then Director of Operations in the Prime Minister's Office ... acted as liaison between the Prime Minister's Office, ACCO [APEC Canada Co-ordinating Office], the Department of Foreign Affairs, the RCMP and foreign bodies. Mr. Carle reported to Jean Pelletier, Chief of Staff in the Prime Minister's Office who, in turn, reported to the Prime Minister. Mr. Carle had access to the Prime Minister to discuss APEC matters as the need arose.²⁷

In one instance Jean Carle's interventions caused protesters who had set up tents and created a protest camp at a site near the planned leaders' conference to be arrested. This was done even though "there was no security reason" for the move and despite the fact that they "were

²⁶ He was, for example, present at a meeting with a staff sergeant moments before a group of peaceful protesters were pepper sprayed even as most of them were attempting to respond to police instructions. Commissioner Hughes draws no inference from this.

²⁷ "Hughes Report," *supra* note 2 at 55.

peacefully protesting,”²⁸ exercising citizenship “rights under section 2(b) of the *Charter*.”²⁹ In this case Commissioner Hughes found:

... the RCMP’s conduct in removing the tents was directly attributable to the actions of the federal government. It was Mr. Carle of the Prime Minister’s Office who, through Mr. Vanderloo of ACCO directed the RCMP to remove the protesters ...

The federal government had no authority to make decisions which may have compromised an RCMP security operation, particularly given that such decisions... were unjustifiably inconsistent with the *Charter*. I am satisfied that, in this instance, the federal government, acting through the Prime Minister’s Office, improperly interfered in an RCMP security operation.³⁰

The Prime Minister’s Office appears equally culpable, though the RCMP emerges looking slightly better with respect to a second clearly proved attempt at *improper* political interference with policing. Again, the political operative most clearly involved was Jean Carle. Jean Pelletier, the Prime Minister’s Chief of Staff was also directly involved in questionable goings-on on this occasion. The Prime Minister, for his part, refused an invitation to testify about his personal involvement.³¹

The issue this time related to the security perimeter that police routinely erect around such events. At one particular site Carle, acting in his official capacity, insisted on moving security fences considerably further back from a planned motorcade route than the RCMP considered necessary for security purposes. The result was to create a distant, postage-stamp sized demonstration area which provided “no real opportunity for the protesters to engage in meaningful protest.”³² Professor Pavlich, then the University of British Columbia’s Associate Vice President, Legal Affairs, told the inquiry that the result was, “There were some people protesting, but I sure as hell don’t think anybody on that cavalcade would have been able to see it.”³³

Although there was some attempt to cloak the interventions of the Prime Minister’s Office in the guise of “security” concerns or merely as

²⁸ *Ibid.* at 96.

²⁹ *Ibid.* at 98.

³⁰ *Ibid.* at 101.

³¹ Pue, “Executive Accountability,” *supra* note 5.

³² “Hughes Report,” *supra* note 2 at 72.

³³ *Ibid.*

expressions of opinion that stopped short of an attempt to directing the police,³⁴ Commissioner Hughes found to the contrary on both counts.

Mister Carle had “inexcusably thrown his weight around.”³⁵ He was found to have offered “spurious” excuses³⁶ and elsewhere his testimony, contradicted by highly credible witnesses, is disbelieved.³⁷ Carle is said to have been “dishonest,” to have conducted himself in an “unworthy” fashion that “surely was a betrayal of the confidence placed in him” within the Prime Minister’s organization.³⁸ His performance at one key meeting was found to be “nothing but a ruse.”³⁹ This is strong language, indeed. Coming from a jurist as cautious and distinguished as Commissioner Hughes, it is an unprecedented indictment of the integrity and honour of a key member of a Canadian prime minister’s staff.

Carle’s actions “were motivated by a drive to shield the 18 leaders from the sights and sounds of peaceful protest”⁴⁰ Such motivations are neither proper nor lawful. On the basis of the evidence before him, Commissioner Hughes found conclusively “that Mr. Carle demanded that the size of the ‘demonstration area’ be reduced in order to accomplish his own agenda and I reject his explanation that the reduction was necessary to ensure the safety of the protesters.”⁴¹ Showing considerable fortitude and integrity, both RCMP Superintendent Thompsett and Chris Brown, Director of International Relations at the University of British Columbia, simply did

³⁴ *Ibid.* at 64.

³⁵ *Ibid.* at 66.

³⁶ *Ibid.*

³⁷ *Ibid.* at 69.

³⁸ *Ibid.* at 70.

³⁹ *Ibid.* at 72.

⁴⁰ *Ibid.* at 75. This conclusion, damning though it is, was disappointing to many complainants who believed they had strong evidence indicating the motivation behind all this was not just a desire to create a retreat, but rather acting in fulfillment of specific undertakings given to then-Indonesian dictator Suharto. Commissioner Hughes declines this conclusion on the basis of the evidence before him in something akin to the Scotts verdict of “not proven”, *ibid.* at 77: “I cannot conclude that these and other documents prove that the Prime Minister’s Office went to extraordinary lengths to assuage Indonesian concerns that President Suharto be shielded from all signs of protest at the APEC conference.” Given evidentiary and jurisdictional constraints on the CPC RCMP this falls short of the exculpatory finding the Prime Minister’s Office no doubt wishes to “spin” out of the report. See interview with I. Whitehall, Q.C., *The National*, 7 August 2001, online: CBC <<http://tv.cbc.ca/national/trans/T010807.html>> (date accessed: 14 September 2001) [hereinafter *The National*].

⁴¹ “Hughes Report,” *supra* note 2 at 150.

not give effect to Carle's improper orders: his demands were not entirely met.

Despite this quiet resistance, Commissioner Hughes found the security perimeter had in fact been moved in a fashion that was "inconsistent with respect for the *Charter* because it limited the protesters' rights for reasons unrelated to security or to the need to allow for the successful conduct of the meeting and may have increased the security risk." In short, the "security" perimeter had become a "political" perimeter. Nonetheless, the fence moved a good deal less than Carle had wanted. Because of Superintendent Thompsett's actions, Hughes concluded that "the interference with the protesters' rights was negligible and the maxim *de minimis non curat lex* applies—the law does not concern itself with trivial matters."⁴²

In this case, then, the RCMP comes off reasonably well, but only because one officer—Superintendent Thompsett—refused to give full effect to improper directions. The Prime Minister's Office, however, was quite conclusively and unambiguously found "guilty" of persistently and aggressively seeking to improperly direct the police for colourable reasons.

Two important principles bear noting in this respect. First, despite his high position in the Prime Minister's Office, Jean Carle had no inherent authority and no right to act outside of the law. Patrick Monahan has explained the principle of lawful state action clearly and succinctly as follows: "All state power must be exercised according to law. No state official has any inherent powers under Canadian law. Therefore, if state officials wish to interfere with an individual's rights, they must be able to point to some valid legal authority for the proposed action."⁴³

This principle applies not only to the Prime Minister's Director of Operations but also to his Chief of Staff and, of course, to the Prime Minister himself.

We are presently left in an awkward situation. Mister Carle, purporting to act on behalf of the Prime Minister, has been twice found to have improperly interfered with the police to the detriment of *law abiding* Canadian citizens. To this point the Prime Minister has neither admitted to having endorsed Mr. Carle's actions nor (the only other alternative) rebuked him for misuse of his position in the Prime Minister's Office. This is an unacceptable constitutional outcome. In our system of government

⁴² *Ibid.* at 151.

⁴³ P.J. Monahan, *Essentials of Canadian Constitutional Law* (Concord, Ont.: Irwin Law, 1997) at 4.

ministerial responsibility means two things. One of Canada's leading constitutional experts, Dean Peter Hogg of Osgoode Hall Law School, has explained the concept in this way:

All the acts of the department are done in the name of the Minister, and it is the Minister who is responsible to Parliament for those acts. In this context, the word 'responsible' is often said to entail two consequences. First, the Minister is supposed to explain to Parliament, when asked, the actions of his or her department. Secondly, the Minister is supposed to resign if a serious case of maladministration occurs within the department.⁴⁴

IV. CONCLUSIONS

Although the principle of responsible government—the keystone of the Canadian constitution—requires the Prime Minister to accept responsibility in a case such as this,⁴⁵ Mr. Chrétien has not wished to respond to the Hughes Report's central findings. The APEC affair moves now from the realm of law and an inquiry process into "politics."⁴⁶ Here is what one lawyer who appeared for the complainants said on the release of the Hughes Report: "We don't know the full story. As to whether or not Mr. Carle's actions were motivated by instructions received from his boss, Mr. Chrétien. We may never know that and Mr. Chrétien, of course, declined Mr. Hughes' invitation to appear at the hearing."⁴⁷

The choice the Prime Minister faces is to either accept personal responsibility for a fundamental and unprecedented constitutional violation, or to try to distance himself from the matter by excoriating a key aide who is also a close personal friend. These choices must be equally unpalatable. The third choice is to ignore the issue hoping that it will go away.

⁴⁴ P.W. Hogg, *Constitutional Law of Canada*, 4th ed., looseleaf (Toronto: Carswell, 1997) (as updated) at 9.3(d).

⁴⁵ "Civil liberties group calls for prime ministerial accountability for political interference at APEC", 9 August 2001. <<http://www.bccla.org/pressreleases/01APECreport.html>> (date accessed: 14 September 2001). See also J.S. Russell: "It's time for Chretien to come clean about APEC," *Vancouver Sun*, 13 August 2001; A.D. Irvine, "PM should Apologize to Protesters," *Toronto Star*, 15 August 2001.

⁴⁶ Both the New Democratic Party and the Canadian Alliance indicated an early commitment to pursuing the matter. Alexa McDonough, the federal NDP leader, told CBC's *The National* on 7 August 2001, that "The findings are very clear, that there was political interference at the highest level and an accounting of that must be fully given." Monte Solberg, then an Alliance MP observed that "The government's obviously been meddling in something they shouldn't be involved in," while both Jim Abbott, also an Alliance MP and Svend Robinson, a NDP MP indicated their determination to see the matter properly addressed in Parliament. See *The National*, *supra* note 40.

⁴⁷ Interview with C. Ward, *The National*, *supra* note 40.

It is unclear at the time of writing whether this matter will be addressed in the autumn 2001 session of Parliament. The House of Commons began that session confronting the aftermath of the 11 September 2001 terrorist attacks on the United States and the government enjoys a parliament in which it faces a divided and ineffectual opposition. Needless to say (though it speaks poorly of them), members of the ruling party have no desire to ask embarrassing questions of their leader, even where fundamental matters of constitutional government are at stake.

Judging by first reactions, the Government of Canada seems determined to employ five strategies to avoid confronting the matter square-on. The following lines of argument were developed by a government lawyer interviewed by Peter Mansbridge on CBC's *The National* immediately following the release of the Hughes report:⁴⁸

- (1) a "dumb cop" defence—blaming the RCMP for all and any wrongdoings;⁴⁹
- (2) emphasizing portions of the report that *appear* to endorse the propriety of government actions;⁵⁰

⁴⁸ See interview with I. Whitehall, *The National*, *supra* note 40.

⁴⁹ See, for example, *ibid.*: "Well, I think what may be most damaging is that there findings regarding the RCMP's planning of the event. Mr. Hughes has been critical of that. I think that's one of the major findings of the commission. And no doubt that will have to be examined by the RCMP and lessons will be addressed." Elsewhere in the same interview Mr. Whitehall remarks:

Well, that is the finding of the commissioner. But then you have to remember that early on, the commissioner asks two questions. He hypothesizes, as the complainants have, that there could be two reasons for the actions of the RCMP. One was in order to accommodate the wishes of the government of Canada in order to accommodate Mr. Suharto or alternatively systemic errors made during the planning of the event. He rejects the first explanation and even examines the systemic problems. And those, those conclusions will have to be examined by the RCMP and see whether or not, in their view, given their technical knowledge of the issue in question, what response they will have. I will remind you that this is an interim report.

Variations on the "it was all the RCMP's mistakes" occurred twice more during the course of the interview.

⁵⁰ Whitehall, *ibid.*, "... we spent I dare say well over 100 days dealing with allegations that the Government of Canada somehow or other pressured the RCMP to suppress freedom of expression in order to accommodate a foreign dictator, Mr. Suharto. That was the central theme of that government inquiry, as I see, for many, many, many, many, many days. And what I found comforting that Mr. Hughes came to a totally unequivocal conclusion that there's no suggestion that that in fact happened and he completely exonerated the Government of Canada." The central "theme" of the inquiry was in fact the allegation that the Government of Canada, acting through the Prime Minister's Office, had sought to improperly influence the police for illegitimate purposes (which was found to have happened). The arguments concerning Suharto suggested one possible reason for this but no more. The "complete" exoneration of the Government of Canada, if indeed such is to be found in this carefully drafted report, is limited only to very specific circumstances. There is, simply, no blanket endorsement of the

- (3) attempting to diminish the findings of Commissioner Hughes (it's only an "interim" report after all);⁵¹
- (4) a sort of "dumb Commissioner" defence - refusing, simply, to accept any findings that reflect poorly on the Prime Minister's Office;⁵²
- (5) a "we told you so" argument that emphasizes the violence of subsequent anti-globalization demonstrations in order to argue that whatever happened in Vancouver in 1997 *must have been* justified.⁵³

Assuming that this outline response represents the position of the Government of Canada—and there has been no other developed response by the Government—it reveals a disturbing attempt to dodge responsibility for matters of fundamental constitutional importance. None of the points withstands critical scrutiny.

Violence at subsequent demonstrations (point #5) is, simply, entirely, irrelevant to an assessment of the matters of government wrongdoing found to have taken place in 1997. The fact that the RCMP may have "goofed" (point #1) or that the government or police may—in some particulars—have acted properly (#2) are simply irrelevant.

The germane questions that have not been addressed relate to the role of the Prime Minister's Office and the Prime Minister's responsibility for the improper conduct of his senior staff. The question of the Prime Minister's personal role in this remains entirely unexplained, unaccounted for, and uninvestigated. It is, not to put too fine a point on it, unbecoming

Government of Canada's actions to be found.

⁵¹ Note the reminder to this effect, quoted in the preceding footnote.

⁵² *Ibid.* Refusing to accept the of the only judicial inquiry to investigate this matter is a bold, perhaps desperate, strategy, revealed in the following exchange:

MANSBRIDGE: Okay. Well let's look at a couple of these things in particular, if I can bring up some of the remarks that Justice Hughes used in his report and we'll get your reaction to them. This is on the removal of the tents. 'The federal government had no authority to make decisions which may have compromised an RCMP security operation particularly given that such decisions were unjustifiably inconsistent with the charter. The federal government, acting through the Prime Minister's office, improperly interfered in an RCMP security operation.' Do you accept that?

WHITEHALL: No, I do not. And I do so with regret. The fact of the matter is that the evidence shows that government officials had a concern about vandalism at that site. That was prior to the site becoming a secure site.

⁵³ *Ibid.*: WHITEHALL: Of course, since this event, we have had much more significant violence and problems at major international events. So to that extent, the rules have unfolded. But nevertheless, this is the first attempt to examine a major security event."

of the highest office in the land, having been found acting improperly *by the only formal inquiry charged with investigating these matters*, to simply announce that it “rejects” the findings (#4). That is a prescription for prime ministerial lawlessness. The findings are there, made by a distinguished, cautious, jurist. They are carefully grounded in the evidence. They are documented at length in Commissioner Hughes’ formal report.

Finally, however it does have to be acknowledged that, in the language of the *RCMP Act*, Commissioner Hughes’ report is called an “interim” report (#3). However, his report is the final word on the only portion of the procedures of the CPC that involves a judicial process. In the workings of this statute, the “interim” report is the only document to emerge from an authoritative, impartial fact-finding process. The rest is left to a formal response by the RCMP Commissioner (an Order-in-Council appointee),⁵⁴ the Solicitor General (a member of the Prime Minister’s Cabinet) and the administrative head of the CPC (an Order-in-Council appointee). The “final” report is not the product of a judicial process and will not be written by anyone who has heard and sifted through all the evidence first-hand.

The arguments deployed so far to deflect attention from the Prime Minister’s Office are “spin,” nothing more. They are part of a political process and do not pass muster as legal argument. The question of further response lies in the realm of “politics.” It is fitting, then, to conclude with the words of two politicians, one on the left and one on the right of the Canadian political spectrum.

Starting from the left, Svend Robinson, New Democratic Party Member of Parliament, assessed the post-Hughes Report situation in this way:

The fact of the matter is that even within the narrow confines of this report, and ... it was a very narrow scope for the commission. Even within that, let’s be very clear about what Justice Hughes found. What he found is that the prime minister’s right hand man, Jean Carle, on two occasions was acting basically as a political thug and getting directions, clear political

⁵⁴ On 7 September 2001, RCMP Commissioner Giuliano Zaccardelli held a press conference in which he accepted blame on behalf of the RCMP for things that went wrong at the APEC conference. See: Hugh Windsor, “When Mountie Zack muffed a golden opportunity” 10 September 2001, page A13; Jim Bronskill, “RCMP erred at APEC, boss admits - Commissioner denies force aims to criminalize dissent” *The Ottawa Citizen* 8 September 2001. The Commissioner showed some embarrassment on the issue of political interference with the RCMP during this press conference but, by and large, repeated the line developed earlier by Government Lawyer Ivan Whitehall – police “goofs,” not political interference, needs to be fixed. For the RCMP response, including the Commissioner’s written response to the Hughes Report: online: RCMP <<http://www.rcmp-grc.gc.ca/news/nr-01-19.htm>> (date accessed: 19 September 2001).

directions to the RCMP. He also found the superintendent May who was in charge of security for the APEC summit believed that the prime minister was directly involved in giving directions for security operations. So I think that what this does effectively is to raise some very serious questions once again about the role of the prime minister. For four years, he stone-walled. He said let the commission do its work. He's refused to appear, even though Hughes basically said look, you should appear if this commission report is going to have any integrity.⁵⁵

From the other end of the political spectrum, Jim Abbott, Canadian Alliance Party Member of Parliament, made these observations:

The solicitor general has said that he is going to comment on the final report. The word final is not a benign word. It's a very active word. He's talking about the fact that this report now goes to the RCMP Commissioner who will then take it apart in his own time. He will then send that report to Shirley Heafey. Shirley Heafey, the head of the Public Complaints Commission, the same person that interfered with this so badly at the start of the APEC inquiry that the three original commissioners ended up leaving the inquiry in disgust until Ted Hughes came along. She will then write a report. Oh, she also was appointed by the prime minister, I recall. Then that report is going to go to the solicitor general who is then going to read it. When? And in the meantime, we have Kananaskis with the G-8 coming up in 11 months. This report has to go to the House of Commons. We have to deal with it at the House of Commons. We have to see that this prime minister or any successive prime minister cannot get involved ... in the way that Jean Chrétien did.⁵⁶

In short, substantial and important matters need to be addressed. There is, however, no process available to deal with a constitutional matter of this importance that is independent of political control. It is equally unlikely, then, that steps will be taken either to remedy the particular wrongdoings or to amend the *RCMP Act* so as to fix the relationship between politicians and police in Canada.

These are disturbing conclusions. I hope they are proved wrong.

⁵⁵ Interviewed by *The National*, *supra* note 40.

⁵⁶ *Ibid.*