SUBMISSIONS TO - The House of Commons Standing Committee
on
Justice and Legal Affairs

RE - Bill C-26
Mail Opening

FROM - Canadian Civil Liberties Association

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Introduction

The Canadian Civil Liberties Association is a national organization with more than 4,500 individual members, 9 affiliated chapters across the country, and some 40 associated group members which, themselves, represent several thousands of people. A wide variety of persons and occupations are represented in the ranks of our national membership - lawyers, academics, housewives, trade unionists, journalists, media performers, minority group leaders, etc.

Among the objectives which inspire the activities of our organization is the quest for legal safeguards against the unreasonable invasion by public authority of the freedom and dignity of the individual. It is not difficult to appreciate the relationship between this objective and the subject matter of Bill C-26. The opening and monitoring of mailed communications represent a substantial encroachment on the liberty and privacy of the correspondents involved.

But what makes these proposed encroachments even more serious, from our point of view, are the earlier revelations that in scores of cases such mail opening has been performed by the RCMP illegally. And, what makes those revelations even more disquieting, is the fact that as of this date none of the wrong-doers has been prosecuted or disciplined. In the circumstances, the very introduction of Bill C-26 appears to confer Governmental legitimation on the law-breaking involved.

It is often said that comparisons are odious. For a generation, nourished on Canadian nationalism, comparisons to the United States may be even especially odious. Yet, when we consider that country's size, importance in world affairs, proximity to us, and experience in the very matters under consideration, some assessment of its corresponding practices becomes unavoidable. In the past few years, illegal activity has been discovered in the security agencies of both countries. While the American response has generally been in the direction of curtailing the powers exercised by these agencies, the Canadian response, in significant ways, has been in the direction of expanding their powers. And, while the Canadian wrong-doers have managed thus far to avoid the processes of justice, their American counterparts in the highest places have been tried in court, sent to jail, and driven from office.

During the course of the ensuing submissions, we will have occasion to treat these themes in somewhat greater detail.

The Overriding Issue

Since the fall of 1977, there has been a wave of allegations and revelations that throughout the years RCMP officers have been involved in scores of illegal mail openings. Yet as of this date not a single charge has been laid or disciplinary measure imposed. The Government's official posture has been to refer all questions of RCMP wrong-doing to the McDonald Commission. In the face of pressing questions both inside and outside of the House of Commons, the almost invariable Government reply was that it preferred to await the findings of the Commission.

It appears, however, that the Government's patience is selective. There is a rush to amend the law but not to enforce it. Yet, until and unless those responsible are brought to justice, the creation of any new mail opening powers will appear as an attempt at retroactive absolution of the law-breaking which has already occurred.

Under the circumstances, the deliberations on Bill C-26 are bound to transmit the notion that the problem concerning the RCMP scandals lies not with the law-breaking but with some defect in the law itself. The impression will thus be created that what the delinquent police officers have done was necessary; even if their deeds were illegal, they can be excused because the law should have permitted them. It is not difficult to appreciate the dangerous implications which are involved in these notions. The concept of such permissible law-breaking can create pressures toward anarchy. If this illegal conduct can be excused in deference to these stated interests, why not the misconduct in other constituencies on the basis of their perceived priorities? Any attempt to distinguish between this law-breaking and that which may be committed by other constituencies will incur another unpalatable risk - that this society accepts the propriety of double standards.

In order to forestall the development and spread of these notions, this Committee should issue a strong recommendation that the Government invoke at once the normal processes of law enforcement with respect to the wrong-doing that has already

occurred. There is no [illegible] reason for the selective monopoly which has been accorded to the McDonald Commission. On the contrary, there is a very real danger that these delays will undermine public confidence in the administration of justice. Indeed, while the cases at issue are left unresolved, why should anyone trust that amended laws would be enforced more conscientiously than the existing ones?

The Criminal Side

On the criminal side, Bill C-26 provides for mail opening on judicial warrant to seize certain drugs and intercept communications with respect to such [illegible].

In principle, the Canadian Civil Liberties Association cannot object to the creation of a mail opening power in order to seize contraband in post. But for such purposes it hardly seems necessary to obtain a warrant for a 60 day period. Rather than analogize to electronic surveillance, such a mail opening power should be analogized more to search warrants. That is, if there are reasonable grounds to believe that a particular and identifiable letter contains contraband, a judicial warrant might issue for that letter alone. There is no reason why such matters cannot be handled on a case by case, letter by letter basis.

Moreover, it is not necessary to read a letter in order to determine whether it contains contraband. This entails the recommendation of a special safeguard which is not now contained in Bill C-26. Once a letter is opened and found to contain nothing which resembles contraband, the police should be required immediately to reseal and return it to the mail <u>without reading any of the contents</u>. In such circumstances, the law should also oblige the police to certify this to a court by sworn affidavit. In short, Parliament should do everything it reasonably can to minimize the needless reading of private correspondence.

The proposed power to intercept communications raises different problems. The only way to determine whether a communication is relevant to the investigation of a criminal offence is to read it. But the very act of reading it constitutes an encroachment on the personal privacy of the parties involved. Moreover, unlike the situation with electronic surveillance which serves as the model for this Bill, the contemplated "interception" may be wide enough to prevent the communication from reaching the intended recipient.

Another difference lies in the fact that most often only the statements of one side will be monitored. The replies, if any, are not as readily subject to interception. Of course, mail surveillance is conducted generally on what is received rather than on what is sent. Thus, a person could attract police surveillance even if he were the unwitting and unwilling recipient of unilaterally incriminating communications from someone over whom he had no control.

Conversely, a guilty recipient could implicate his innocent senders. To whatever extent there were a warrant against his mail, numbers of their communications to him might fall, even coincidently, within its terms. Of course, the broader the terms of the warrant, the larger the number of innocent letters which would be subject to such intrusion.

On the other hand, as a weapon to enforce narcotics legislation, the power to read mail communications is of very limited value. What even partially sophisticated drug dealer would be likely to write incriminating statements in letters? A similar point was made by no less an authority than RCMP Chief Inspector T.S. Venner in his testimony before the McDonald Commission. The following is an instructive extract from his evidence.

> "In very few of these parcels or letters, or whatever, that are opened, is there any communication found therein. What we are talking about here is parcels or letters containing drugs; very seldom messages or communications. I think it is important, because again, I think there is a widespread belief that it is our intent to interfere with the privacy of communication, more so than with getting a hand on the contraband substance itself. And it is simply not the case".[1]

When we balance the enormity of the proposed encroachments on personal privacy against the paucity of anticipated gains for law enforcement, we are obliged to oppose the suggested power for the interception of mail communications.

Alternatively, to whatever extent there is a Parliamentary insistence on proceeding with this dubious proposal, the powers should be handled more like search warrants than like wiretap authorizations. At the very least, therefore, amendments should be adopted more clearly providing that warrants could not issue for broad categories of letters not yet in existence. Moreover, under such an approach the lifetime of a warrant could not be as long as 60 days. The idea would be to restrict these powers, as far as possible, to particular and identifiable letters.

The Security Side

On the security side, Bill C-26 seeks to apply the Official Secrets Act to the interception of mail communications as that Act now permits the electronic bugging of oral communications. This raises once again the propriety of the distinction which our law makes between security and ordinary crime-related surveillance. On the criminal side, both the wiretap law and the mail opening Bill talk about "the investigation of offences". This appears to contemplate a power of a tactical nature, addressed to unlawful conduct which has been or is being committed. But on the security side, the law and the Bill talk about the "prevention or detection" of certain "activities". This power appears to be more strategic and long-term; no immediate illegalities need be involved. Thus, while all surreptitious surveillance creates disquiet, the powers on the security side are especially dangerous. Since their invocation does not require discernible crime, they can more readily be used against innocent people.

Yet, despite the more pivotal role played by the United States in world affairs, that country appears to be moving away from this distinction.[2] In mail opening and electronic bugging, the Americans have reduced substantially the permissible

ambit of strategic intelligence activity. With very few and very limited exceptions, the exercise of such surveillance, even in security matters, requires evidence of specific crime.[3]

In view of this American trend, how can Canada justify extending this distinction between crime-related and strategic surveillance? What security threats here, foreign or domestic, are appreciably more numerous, dangerous, and invulnerable than those which face the United States?

Accordingly, the direction in Canada should be away from the broad kind of strategic mail opening power contemplated for the Official Secrets Act. Rather, to whatever extent such a power can be justified here at all, the approach should be more in the direction of requiring evidence of a criminal offence, past, present, or at least imminent. But even at that, the power at issue should be confined to what is demonstrably necessary for security purposes. The details of this approach will require, of course, a more thorough investigation of the law in the United States and the facts in Canada. Perhaps, the Committee might invite testimony from American experts? Perhaps, on the other hand, the entire matter should be referred back to the McDonald Commission for further study and recommendations?

Alternatively, to whatever extent Bill C-26 retains such a strategic surveillance power, the specifics of the operative enactments should be considered. Section 16 (3)(c) of the Official Secrets Act talks about "activities directed toward accomplishing governmental change...by force or violence or any criminal means". But why should the law allow mail openings for activities that employ""any criminal means" beyond "force or violence"? To what extent, for example, would this section create a risk of such surveillance against the organizers of the Canadian Labour Congress national walk-out against the federal wage and price control program? In some provinces at least, this walk-out has been declared unlawful. Would that make it "criminal" for the purpose of this section?[4] In any event, there is no basis for allowing such surveillance in the domestic area to extend beyond those who employ "force" or "violence".

Another key defect in the Bill is the proposal to empower the Solicitor General to authorize mail opening in the security area. Why should court approval be necessary for ordinary criminal cases but not in security matters? Even if the Solicitors General of this country were to perform such duties with impeccable judgment, there is too great a risk that they will not be perceived that way. As politicians, they will frequently be suspected of having acted on the basis of political rather than security considerations.

Indeed, one of the greatest concerns about surveillance in security matters is the risk of confusing legitimate dissenters with subversive conspirators. So long as the effective decisions on such matters can be made by the Government of the day, this will lead to anxiety among its political competitors. Indeed, the mere existence of this power could in time inhibit and intimidate various manifestations of legitimate social and political protest.

These misgivings are fortified by the actual experience of recent years. Compare, for example, the practice in the U.S. and Canada during periods when their security powers were most similar, 1971 and 1976 respectively.[5] In 1971, the number of U.S. bugging installations in the national security area amounted to 117.[6] In 1976, the number of Canadian intercept warrants for national security matters totalled 517.[7] Of course, no reasonable person can believe that Canada was so much more menaced than the United States by espionage, subversion, and terrorism. The more plausible explanation is that the Canadian Solicitor General permmitted such intrusive surveillance in many cases where there was no need for it.

It is crucially important, therefore, to build more viable safeguards into the Canadian system. In our view, no mail opening warrant should issue unless it has been approved by a body or tribunal, independent of the reigning government. Whether such a body be a court, parliamentary committee, or special tribunal established for that purpose, we need not resolve at this point. Suffice it to urge here that the incumbent government not be able to exercise such power unilaterally and unreviewably. No tribunal of this kind would be likely to refuse a warrant in a proper case. But, being more independent of the political process, it might well be more demanding as to the time,

character,and terms of warrants that it approves. Moreover, its mere existence could serve to deter the Government from even requesting surveillance warrants in unjustified cases. In any event, independent scrutiny would constitute one of the few safeguards available in security cases.

On this issue too, the United States experience is likely to be instructive. Even in the security area, the need for prior judicial warrants characterizes so much of the American power to conduct mail and electronic surveillance.[8] Despite these additional due process requirements, there is no indication that the United States is commensurately more vulnerable than Canada to subversive penetration.

Moreover, any such mail opening power should require warrants on a letter by letter basis. While such a requirement would not likely endanger our national security, it might help to minimize the assaults on our privacy. Alternatively, to whatever extent Parliament insists on analogizing mail opening to wiretaps rather than to search warrants, it ought to provide for a time limit on the security side as is now proposed on the criminal side. In view of the fact that renewals could be secured in appropriate cases, no legitimate state interest would be lost and certainly some measure of due process would be gained by providing for a legislative time limit on surveillance warrants.

The notification provision on the criminal side operates to build some measure of accountability into an otherwise completely surreptitious practice. Again, the dangers of improper surveillance which inhere in security matters create misgivings about the lack of notification requirement on the security side of Bill C-26. In our view, the Bill ought to contain some system of notification. Perhaps, in view of the greater sensitivity in security surveillances, the scrutinizing tribunal might be empowered to postpone compliance indefinitely? Even that would be preferable to the complete absence of a notification possibility.

A General Safeguard

While Bill C-26 provides generally for the exclusion from evidence of any communication unlawfully intercepted, it fails to include a similar provision for other matter, i.e. contraband,unlawfully seized. Indeed, it treats such unlawfully seized matter like derivative evidence from an unlawfully intercepted communication. That is, a judge may (not must) refuse the introduction of such evidence if he considers that it would "bring the administration of justice into disrepute". In our view, this distinction is not tenable. There is no reason for such reluctance to render all of the contents of illegally opened letters inadmissible as evidence in court. A forthright measure of this kind might help to reassure Canadians of Parliament's determination to keep the RCMP within the boundaries provided by law. In the light of the disclosures of the last few months, such an opportunity should not so readily be lost.

Summary of Recommendations

In summary, the Canadian Civil Liberties Association recommends that the House of Commons Justice and Legal Affairs Committee adopt the following measures.

1. Recommend that the Government of Canada invoke at once the normal processes of law enforcement with respect to the illegal mail opening that has already occurred.
2. Require that any mail opening power to seize contraband be available, like a search warrant, only on a letter by letter basis.
3. Require that in a case of a letter opened for contraband which contains nothing resembling it, the police reseal and return the letter to the mails without reading the contents and that they certify this to a court under oath.
4. Reject the proposed power to open mail for the interception of communications in relation to drug offences.
5. Alternatively, require that such power be exercised, like a search warrant, on a letter by letter basis.
6. In the security area, move away from the broad kind of strategic power proposed for the Official Secrets Act.
7. To whatever extent such a power can be justified here at all, move more in the direction of requiring evidence of a criminal offence - past, present, or at least imminent.
8. In any event, confine such power to what is demonstrably necessary for security purposes.
9. Alternatively, require that any strategic mail surveillance against possible seditious activity be confined to anticipated force or violence.
10. In any event, for all mail opening power in the security area, require
    (a) prior judicial warrants
    (b) letter by letter permission
    (c) alternatively, statutory time limits on the length of surveillance
    (d) some provision for notification.
11. Render inadmissible as evidence in court not only communications, unlawfully intercepted, but also contraband, unlawfully seized.

Notes

[1]Commission of Inquiry Concerning Certain Activities of the RCMP, Hearing Transcripts (Quebec: Boisjoly & Associes) testimony T.S. Venner, p. 2819.

[2]Unfortunately, the unexpected acceleration of the Committee's hearings precluded the scope of American research that we had planned. Our statements on the state of U.S. law are based upon telephone consultations with some of our American colleagues and a perusal of certain key documents.

[3]Another feature, no less frequently associated with these forms of surveillance, is the requirement of a prior judicial warrant.
On mail opening, see Executive Order 12036, s.2-205, Jan. 24, 1978 (Federal Register Vol. 43, No.18).
On electronic bugging, see United States v. United States District Court 407, U.S. 297 (1972).

[4]See section 423 (2)(a) of the Criminal Code which makes it unlawful to engage in a conspiracy "to effect an unlawful purpose". There is some jurisprudence to the effect that the unlawful purposes contemplated by this section can include violations of provincial statutes. See R. v. Wright,(1964) 2CCC 201 and R. v. Layton Ex. p. Thodas (1970) 5 C.C.C. 260.

[5]1971 was the last year during which the Americans engaged in strategic electronic bugging, without judicial warrant, in both foreign and domestic security cases. In 1972, the U.S. Supreme Court overturned this practice at least in the domestic area. (See Note 3, supra). In 1974, the Parliament of Canada conferred on the Solicitor General the power to grant strategic intercept warrants with respect to "subversive activity" of both foreign and domestic variety. While the powers prior thereto were relatively undefined and perhaps, therefore, broader, this enactment created a situation here sufficiently like the American situation to justify comparison. Moreover, following 1974, the Canadian Government was reqired,for the first time, to publish statistics on these practices. See Note 7, infra.

[6]See the prepared statement of Edward A. Levi, U.S. Attorney General, Select Committee to Study Governmental Operations With Respect to Intelligence Activities, Hearing Transcripts, Vol.5 (Washington: Government Printing Office) U.S. Senate, 1976,p. 69.

[7]Canada. Dept. of the Solicitor General. The Annual Report to the Governor General of Canada as Required by s.16 ss.5 of the Official Secrets Act. (Ottawa: Queen's Printer), 1976.

[8]See Note 3, supra.