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

RE - Bill C-83

FROM - Canadian Civil Liberties Association

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TABLE OF CONTENTS

Introduction

The Canadian Civil Liberties Association is a national organization with more than 3000 individual members, eight affiliated chapters across the country, and 50 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 the Canadian Civil Liberties Association 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 Bill before this Committee. In a number of important ways, Bill C-83 would expand the powers of the authorities to encroach upon key freedoms of the individual.

In view of the centrality of these freedoms to the democratic system, such encroachments must be rejected unless their proponents can demonstrate why they are necessary to the protection of an overriding public interest.

The interest at issue here, we are told, is the peace and security of the Canadian public. While we are unable to impugn, of course, the goal to be served, we are obliged to question, at this point, the means to be used. It is the thesis of the brief which follows that the Government of Canada has failed to discharge its onus in this matter. To be sure, the Government has engaged in an ambitious campaign to explain this Bill. It has published a large quantity of literature and its spokesmen have made numerous speeches in many forums. It has even produced and distributed a film. In our view, however, the explanations advanced have amounted to little more than a recital of the crime problem and an expression of the need for tough measures to deal with it. What has been missing is a hard-headed analysis of precisely how and why many of the specific measures in Bill C-83 are necessary to the goals in question.

Indeed, we believe that much of this Bill is essentially an exercise in legislative muscle flexing. With few exceptions, the enactment of the tough measures proposed would produce no additional "peace and security". Moreover, in many instances, whatever benefits there might be, could be achieved by less intrusive means. In short, the major consequence of adopting the measures questioned herein would be a greater and gratuitous erosion of civil liberties.

It is the respectful opinion of the Canadian Civil Liberties Association that virtually no other federal bill in recent years has threatened so many of our society's beliefs while offering so little for its people's needs.

Electronic Surveillance

The Danger Involved

One of the most frightening features of George Orwell's 1984 was the deployment in every home of a special television screen by which Big Brother could monitor all private conversations.

The revulsion evoked by Orwell's fantasy grows out of the importance which our society attaches to personal privacy. Even when "objectively" there is nothing to hide, people in our society seek a retreat from scrutiny - a secluded sector in which to feel and be themselves, to ventilate uninhibitedly their hopes and fears, their joys and pains.

The increased employment of electronic surveillance threatens to revive the images of 1984. The technology is sophisticated enough now to invade our most intimate retreats. Indeed, there is no place which is immune from the power of electronic penetration.

Although only two years have elapsed since Parliament imposed certain restrictions on this intrusive activity, the Government is proposing now to undo some of the very measures which were then taken. The Government is seeking broader bugging powers for the police.

Unfortunately, an attitude of unreality has characterized much of the public discussion about this subject. There is a tendency to treat electronic surveillance as though it were a simple investigative tool similar essentially to all other such tools in the arsenal of law enforcement. With rare exception, public discussion tends to overlook the uniqueness and enormity of what is involved.

A more valid insight into this phenomenon is yielded by the American experience of the past number of years. An examination of the U.S. data reveals that to date some 1500 people have been convicted of criminal offences arising out of cases in 1969 and 1970 where bugs had been used.[1] During the course of this bugging, however, the American authorities overheard more than 40,000 people in more than a half a million conversations.[2] Undisputably, the overwhelming number of these people were innocent of wrongdoing. The trouble, however, is that electronic bugs cannot discriminate. They overhear everyone within earshot - the guilty, the suspicious, and the innocent alike.

As the employment of such surveillance continues and increases, it is inevitable that more innocent people will be caught in its net. What is inevitable also, is that more people will come to believe they are being overheard even if, in fact, such is not the case. The more that bugging is employed and allowed, the more people will believe that they are its victims.

At some point, the growth of such beliefs could substantially reduce our society's experience of personal privacy. The enjoyment of privacy requires, of course, not only the reality but also the feeling of withdrawal from unwanted scrutiny. To deprive people of this feeling is to subject them to some of the most disquieting effects of the 1984 phenomenon.

While privacy is not an absolute, it is sufficiently central to the integrity of our people and our democratic structures that those who seek the pervasive encroachments of electronic surveillance should be put to a severe test. Parliament should reject all proposals which would expand this dangerous practice unless the proponents can demonstrate that the evil to be purged is greater than the evil to be used and that the goal in question can not practically be achieved without the means in question.

The Permissible Grounds

Organized crime is the evil which is most often invoked to justify some of the further proposed increases in police wiretap powers. According to the Government, the present law does not permit the police a sufficient level of electronic bugging to penetrate the sophisticated criminal syndicates. Under existing law, bugging warrants cannot be obtained for non-indictable offences under any circumstances. Noting that sometimes the syndicates are involved in the commission of lesser offences, the Government proposes to expand the area of permissible bugging to include all offences, indictable and non-indictable, which form a part of a pattern of organized criminal activity.

Unfortunately, the words "organized criminal activity" are nowhere defined with adequate precision. Such terminology is sufficiently broad to embrace not only the sophisticated operations of international syndicates but also the relatively innocuous activities of small-time bookmakers. Many unlawful activities are "organized". Not all such activities, however, can be categorized as greater threats to the body politic than electronic surveillance.

There would be cause for concern, however, even if the legislation more precisely addressed itself to the sophisticated syndicates. Even in this troublesome area, it is far from clear whether electronic bugging is really necessary.

Consider the American experience. In the mid-1960's, the FBI was ordered to stop its growing practice of electronic bugging in the domestic arena. Yet, from 1966 until 1969, without any bugging at all, there was a reported increase in convictions and a tripling of indictments against members of the syndicates.[3] Despite its unhappiness about the lack of wiretap power, the FBI declared that 1968 "was a year of striking accomplishment against the bulwark of the hoodlum criminal conspiracy - La Cosa Nostra".[4] Law enforcement claimed this success <u>without</u> the use of electronic surveillance

It is significant also that the U.S. President's Commission on Law Enforcement and the Administration of Justice paid special tribute to two cities for continuing "to develop major cases against members of criminal cartels".[5] The two cities so mentioned were New York where the police were bugging extensively and Chicago which was subject to Illinois' total ban on such activity.[6]

Despite the grant of special wiretap powers by a 1968 statute of the American Congress, there has been a mixed response from the special Strike Forces which had earlier been created to fight organized crime. One Strike Force Coordinator made the following statement about electronic surveillance.

> "It has not often been applicable. We have been able to make a case without it and we have had more indictments and convictions than any Strike Force in the country."7

Although the foregoing evidence cannot condemn electronic bugs as harmful in the organized crime area, it does suggest that they are far from indispensable. In view of how pervasively wiretaps invade the privacy of innocent people, we submit that necessity, rather than mere utility, should be the test of their acceptability.

Apart possibly from cases of international espionage and emergencies involving imminent peril to life or limb, the necessity for electronic bugging has never been demonstrated.

While the present Criminal Code permits a power to bug beyond the demonstrated need, Bill C-83 would permit even more. If this Bill is passed, it will become legally possible for the police to obtain bugging warrants in respect of all indictable offences, whether or not organized crime is involved. In this connection, the Explanatory Notes issued by the Federal Government make the following observation.

> "Under the present law, authorization for interceptions may be made only in respect of a list of certain specific indictable offences and any indictable offences under certain circumstances involving organized crime. Thus, the Court has no discretion to permit an interception in the case of violent or potentially violent crimes that are not covered in the list, such as rape."

Such comments appear to ignore the weight of expert testimony concerning the extent and limits of wiretapping as an investigatory technique for crimes of violence. Note, for example, the following statement by Brown and Peer.

> "Wiretapping is of very little use in connection with ordinary felonies and crimes of violence. There is lacking in this sporadic sort of crime the pattern of continuity necessary for effective wiretap operation by the police." [8]

In elaborating upon the alleged need to bug in rape cases, the Government's Explanatory Notes make a remarkable statement.

> "A criminal will sometimes use the telephone to threaten the rape victim not to report the offence to the authorities."

This comment overlooks the fact that, under the existing law, it would be quite legal to tap the victim's telephone, with her consent. Indeed, such a tap would not even require a judicial warrant.

On the strength of such explanations, the Federal Government seeks to make it legally possible for the police to obtain bugging warrants for all indictable offences. Potentially, therefore, technological eavesdropping could be used also for such relatively minor matters as impaired driving, simple possession of marijuana, and the theft of a fifteen cent newspaper. Of course, it is hard to believe that the police would want to bug in such cases. But if that is so, there could be no conceivable justification for making it legally possible.

The Procedural Safeguards

The Government Bill plans not only to increase the wiretap powers of the police but also to remove some of the safeguards from the citizen. At present, the law requires that within 90 days of an investigation, the police must notify the persons they have bugged. This safeguard acts as a deterrent against needless bugging. The mere knowledge that eventually their suspects will find out helps to keep the police from seeking wiretap permission unless, in the circumstances, it is essential. Arguing that the notification requirement could alert criminals that they are under surveillance, the Government proposes now the complete repeal of this safeguard.

But this Government proposal overlooks the fact that, at present, the courts are fully empowered to extend the notification period if, in their judgment, earlier compliance would jeopardize an investigation. It's hard to imagine why this exception is not sufficient to protect whatever legitimate police interest may be involved. Indeed, it's hard to imagine a legislative enactment as responsive as this one to both law enforcement and personal privacy.

As regards those persons who have been unlawfully bugged, the Government Bill would continue the exclusion from court of the conversations overheard, but secure the admission in court of other evidence thereby obtained. In our view, however, law enforcement should be denied all such fruits of illegal wiretapping. Indeed, if this derivative evidence is not excluded, there will be few viable deterrents to unlawful surveillance. As an investigative activity, bugging is pursued not for tapes but for leads.[9] To allow the police to exploit these leads in this way is to

reduce the incentive for them to obey the law. Contrary to a number of recent statements by Federal Cabinet Ministers, we must discount as unlikely the prospect of successful prosecutions, law suits, or disciplinary proceedings against those police officers who resort to unlawful surveillance.

Indeed, if such derivative evidence is rendered fully admissible, it will become much more difficult even to learn of unlawful bugging. Under the existing law, it is possible, during the course of a criminal trial, to cross-examine police witnesses in order to determine whether, apart from recordings, their evidence emanated from an illegal bug. But if the law changes according to the Government proposal, such cross-examination will no longer be relevant to any issue in the context of such a trial. The mere discovery of an illegal bug would require, therefore, separate action against the police by the police or by an aggrieved party. The experience with such action in this country hardly justifies the present bout of sanguine statements from Government spokesmen.

It reflects no disrespect for the integrity of the vast majority of Canada's policemen to insist that, as regards the duty to keep investigations within legal limits, Governmental assurances are no substitute for legislative safeguards.

The Government proposes also to extend the initial bugging authorization period from a maximum period of 30 days to a maximum of 60 days. In view of the report that during 1974 and 1975 the courts permitted average surveillance periods of more than 68 days and more than 54 days respectively, this extension would relieve the police of the need to apply so often for renewals of their bugging warrants. According to the Government, an initial authorization of 60 days would "reduce administration time and expense."

Inevitably, however, there are cases in which the authorization periods fall below the averages. Indeed, in a minority of cases, the police did not even seek to renew their warrants. Perhaps in some situations the evidence from the initial bug could not justify a renewal? Perhaps in some cases, the anticipation of judicial scrutiny discouraged the police from making the requests?

Even if such circumstances arise infrequently, the Government's proposed extension should be rejected. As noted earlier, even 30 days of surveillance is likely to produce intrusions into the privacy of scores of people beyond the suspects who occasion the bugs. The need to renew the warrant represents one of the few opportunities which the law provides for independent supervision of this pervasive snooping activity. The expenditure of some additional "time and expense" is a price well worth paying if society can purchase thereby a little more protection for the privacy of innocent people.

Dangerous Offenders

The Concept of Preventive Detention

The Government Bill proposes to replace the present "habitual criminal"and"dangerous sexual offender" enactments with a new "dangerous offenders" section. Before examining the specific proposal, it is useful to consider the general concept.[10]

Preventive detention has been justified on the basis that the general sentencing structure is considered inadequate to deal with certain dangerous offenders. It is thought that restricting the Courts to the imposition of a definite term for the current offence means that a dangerous offender will have to be released while he may still be a menace. The current offence may be relatively minor, preventing the application of a term long enough to provide for treatment and safe custody. Therefore, the offender's term should not depend upon his current offence, but on his dangerousness and fitness for release.

Such a provision depends, however, on a reliable means for identifying dangerous offenders. But no such reliable methods are available. By now there is sufficient experience to cast considerable doubt on the predictive capacities of the experts on human behavior - the psychiatrists. Study after study has demonstrated the psychiatric predisposition to over-predict dangerous behavior.[11]

Moreover, the wide discretion inherent in preventive detention makes it highly susceptible to inequality of application. The experience with the present section shows wide variation from province to province. British Columbia, for example, resorts to preventive detention far more than the other provinces. The enormity of the consequences increases the potential for oppressive plea bargaining.[12]

Finally, it offends democratic notions of criminal law to deprive people of their freedom, not primarily for what they have done but rather for what they are. The regular sentencing power provides ample opportunity to detain, for long periods of time, and, even for life, those people who have committed dangerous acts. Nothing less than such a dangerous act should be permitted to trigger a criminal sentence of life imprisonment.

The Influence of the Oulmet Report

The proposed law derives largely from the proposals in the Report of the Canadian Committee on Corrections 1969, (popularly known as the"Oulmet Report"), and yet it compares very unfavourably with those recommendations.

The threshold requirement in the Oulmet Report was that an offender, in order to be sentenced to preventive detention, had to be classed as a"dangerous offender" i.e. someone who is "likely to kill, inflict serious bodily injury, endanger life, inflict severe psychological damage or otherwise seriously endanger the personal safety of others". The Oulmet Report would have collapsed the current distinctions between "dangerous sexual offenders" and "habitual criminals". Not only does Bill C-83 maintain these distinctions but it also widens the ambit of preventive detention.

The Successor to the "Habitual Criminal" Enactment

The threshold requirement in Bill C-83 is that the offender constitute "a threat to the life, safety or physical or mental well-being of other persons". The weaknesses of this are manifold. In the first place, the "threat" need not be a serious threat, nor need it be likely that the offender will cause harm in the future. There must merely be a "threat". A fair interpretation of this would be that if it were possible that the offender would cause any of the mentioned harms, that would be sufficient to impose preventive detention. What, then, are the harms? It is sufficient that the offender be a threat to "the life, safety or physical or mental well-being of other persons". As legal definitions are only as strong as their weakest link, the important phrase in this definition is "physical or mental well-being". On the basis of such language, a person could face a lifetime of incarceration simply because of the possibility that, at some time in the future, he might cause another person annoyance or discomfort.

Is the breadth of this provision limited by subsections (I-III)? First of all, it is unclear whether the subsections are intended to restrict the introductory paragraph or merely to delineate the evidence which might be present. The word "showing" is not the same as "establishing", much less "proving beyond a reasonable doubt". This ambiguity should be clarified.

Assuming that these Subsections are intended to restrict the introductory paragraph, the restriction does not seem to be very substantial.

By Subsection (I) what must be shown is "a likelihood" of causing "death or injury to other persons or inflicting severe psychological damage upon other persons". The major weakness here is "injury". Surely, some such words as "serious personal bodily" must be inserted before "injury". Otherwise a pin prick or a broken window will suffice.

But even the elements of Subsection (I) need not be present. Subsections (II) and (III) provide independent grounds. The first such ground is "persistent aggressive behaviour...showing a substantial degree of indifference on the part of the offender as to the reasonably forseeable consequences to other persons of his behaviour". The problem with this requirement is that it does not even involve an attempt to predict future criminal behaviour and allows preventive detention for life of people who are merely annoying or unkind.

The final independent ground is "any behaviour by the offender, associated with the offence with which he has been convicted, that is of such a brutal nature as to compel the conclusion that his behaviour in the future is unlikely to be inhibited by normal standards of behavioural restraint". The problem with this is that it is hard to conceive of any conduct that could be characterized as "brutal" in any sense that would not qualify under this provision. The question then becomes whether brutishness is to be an independent criterion for imposing lifetime preventive detention.

In short, it is hard to escape the conclusion that these provisions provide almost unlimited powers to trial judges to sentence to life imprisonment anyone convicted for an offence mentioned in the proposed Section 687 (a) or (b). More fertile ground for disparity and plea bargaining is difficult to imagine. Even the limitations provided by the requirement of conviction for an offence mentioned in 687 (a) or (b) are weak.

There is no requirement that the offence itself be a violent offence, merely that it "involve" violence or attempted violence, or endanger the "safety" of another person and that it carry a maximum sentence of ten years or more. It should be noted that many property offences carry maximum penalties of ten years or more, for example, theft where property stolen has a value in excess of $200., and breaking and entering. Furthermore, under the proposals the "violence" need not be "serious", so that, for instance, minor robbery of the purse snatching variety would qualify under the provisions.

The Successor to the "Dangerous Sexual Offender" Enactment

The proposed law re-enacts the current law with one important exception discussed below. It is difficult at this point to overlook some of the obvious defects in the current law. First, the definition provision is dangerously wide. Specifically, "injury" and "pain" ought to be qualified by some such word as "serious", and the phrase "other evil" ought to be rejected for reasons of vagueness, breadth, and intangibility. If it is thought necessary to substitute something for this, "severe psychological damage" is probably the lower limit of acceptability. Second, with respect to subsection (b) of Section 687 (the definition of "serious personal injury offence"), the consensual offences (statutory rape and gross indecency) should be specifically restricted to offences involving children of, at the oldest, fourteen.

There is one respect in which the proposed law differs from the current law. The current law requires it to be proved that the offender "is likely to cause injury" etc., but the proposed law requires only that the offender "has shown...a likelihood of his causing injury"etc. The difference is that where the present law requires proof of current likelihood, the proposed law will be satisfied with evidence of past likelihood, whether or not it can be proved at the time of the hearing that the offender is likely to cause the mentioned harms. The result of this change will be subtly to widen the net of preventive detention, enhancing the likelihood of mistaken predictions of dangerousness.

The Burden of Proof

Whether it is intended or not, the proposed new dangerous offenders section may effect a fundamental change in the burden of proof. Under the current law, no reference is made to the standard of proof and consequently the courts have required that the traditional standard of "proof beyond a reasonable doubt" be met with respect to each essential element of the definition.[13] However the proposed law uses the words "established to the satisfaction of the court". This might well be interpreted as imposing a lesser burden. Since no reason has been advanced at this time which would justify any intrusions on the traditional onus of proof, the foregoing language ought to be modified accordingly. Perhaps, the word "proved" might be considered as a possible substitute?

Facilities

The Ouimet Report "predicated" its proposals "upon the existence of necessary custodial and treatment facilities appropriate for this class of offender". Yet there is nothing in the proposed legislation or in the explanatory material which requires or provides for such special facilities. And there is no suggestion any where that the prisoner should acquire any right to treatment. In other words, there is no assurance that the regime for dangerous offenders will be any different from the regime for other offenders.

Indeed, Bill C-83 provides for commitment to a penitentiary. While this may be justified where the object of a sentence is punishment or deterrence for an offence. It is totally devoid of justification where the purpose is solely treatment or the prevention of future danger. In such cases, if detention can be justified at all, the circumstances must be as free of the usual oppressiveness as security will allow.

In any event, to whatever extent preventive detention survives, the availability of proper treatment should be regarded as the indispensable prerequisite.

The Right to Review

The Oulmet Report recommended that "In addition to an automatic yearly assessment and review by the Parole Board,...a person sentenced to preventive detention as a dangerous offender be entitled to have a hearing every three years before a Superior, County, or District Court Judge or Judge of the Court of Sessions of the Peace, for the purpose of determining whether he should be further detained or his sentence should be terminated if he has been released on parole". No such provision is present in the proposed legislation here under discussion. Yet some such provision is crucial, because it keeps the onus squarely on the state periodically to demonstrate the necessity for an essentially non-punitive detention. In the context of a parole hearing the onus is naturally on the detainee to demonstrate why he ought to be released. This, in our view, is a reversal of the proper order of things.

The Custody and Release of Inmates

Remission

The Government Bill proposes to abolish statutory remission and substitute for it earned remission equivalent to the total that may currently be obtained through both earned and statutory remission. The object is said to be to "provide better control in penitentiaries and to strengthen the process whereby inmates are released into the community" and to "promote better conditions within institutions, including greater participation in program."

In our view, this proposal is potentially unfair and perhaps even self-defeating. It would give the prison authorities much more control over the length of time to be spent in prison thereby increasing the indeterminacy of the sentence, and with it the potential for arbitrariness and disparity. The benefit of statutory remission is that it combines the provision of an incentive for good institutional behaviour with fairness to the inmate. Loss of statutory remission depends upon conviction for a disciplinary offence before an impartial tribunal. Furthermore, as long as the rules which the inmate is required to obey are set out clearly, his retention of remission remains, to some extent at least, within his control. If he obeys the rules, he is entitled to the remission. This is consistent with the legitimate objectives of the institution and the dignity of the inmate.

With respect to earned remission, it is an important element of the present law that once earned remission is gained, it cannot be lost.

In our view, the proposed changes threaten to create the worst of both worlds. Not only can earned remission, once gained, be lost, but the certainty and fairness ensured by statutory remission are gone.

The current provisions for earned remission are a model of vagueness. The statutes provide that an inmate "may be credited with three days' remission of his sentence in respect of each calendar month during which he has applied himself industriously". Commissioner's Directive No. 218 provides that an inmate works industriously when "he makes an effort to participate co-operatively in the approved program of inmate

training; and by his attitude he demonstrates an interest in his ultimate rehabilitation in society." Such indeterminacy can lead to uncertainty on the part of the inmate as to what is required of him, frustration of inmates, tension in the institution, disparity in sentences unrelated to the purposes for which they were imposed, and public uncertainty about the length and reasons for imprisonment.

Furthermore, the potential for double punishment that now exists will be exacerbated under the proposed changes. Section 6 of the above mentioned Directive provides that earned remission can be denied where there has been conviction for a disciplinary offence for which the offender has forfeited statutory remission. Under the proposals one offence could be the grounds for both forfeiting and not awarding earned remission. The proposed changes will also increase the overlap of jurisdiction between the prison authorities and the Parole Board by increasing the sanctions for failure to participate satisfactorily in prison programmes.

Yet, there does not seem to be any evidence that such a measure is warranted. Is institutional discipline getting worse? Are current powers inadequate? Recent investigation suggests that, if anything, current powers are greater than necessary.[14]

The second ramification of the proposed change is the effect that it will have on the jurisdiction of the Courts to ensure that the requirements of natural justice are complied with. It is only because an inmate is entitled as of right to his statutory remission that a Court will interfere with forfeiture proceedings that infringe the principles of natural justice.[15] Thus, by indirection, the proposal excludes this safeguard. At the very least, a statutory right to a fair hearing in forfeiture proceedings ought to be guaranteed in place of this. It is insufficient, for these purposes, to rely on procedural safeguards under Commissioner's Directives, because infringements of these Directives are also not reviewable.

A final comment must be made about the possible retroactivity of the proposed changes in remission. Sections 39 (dealing with federal institutions) and 43 (provincial institutions) of Bill C-83 are not in terms retroactive, and they seem to contemplate that inmates will retain any statutory remission that has accrued to them under current legislation.[16] However, this is nowhere expressly provided for. Furthermore, the explanatory note to Clauses 38 and 39 of the Bill reads: "This new

system of remission would apply to inmates now incarcerated but for the future only." Yet, as all inmates now incarcerated have already received their full statutory remission, in the sense that it is automatically credited to them upon entry, it is hard to see how the proposed system could apply to them at all without taking away some of that remission. Otherwise, the most they could receive in earned remission is the three days per month currently available. The only explanation is that the proposed provisions see statutory remission as something that is gradually gained, whereas it is really something that is granted once and for all - subject to forfeiture - upon entry. The proposed provisions seem to contemplate that inmates now incarcerated will be credited with one quarter of the time already served before the new law comes into effect plus whatever earned remission has been earned, and that they will be required to earn the rest. But this would be retroactive legislation in that it would substitute a discretionary privilege for a vested right, all of this to take place after conviction and sentence. Not only would this infringe the most basic principles of the rule of law and legality, but it would ignore the probability that in many cases the trial judge, in deciding on the appropriate length of sentence, would have taken into account and compensated for what was then an automatic reduction in time to be served.

The proposals must, therefore, be reframed to avoid any possibility of them being applied retroactively. The easiest way to do this would be to refrain from repealing the current law, providing instead that it is only to apply to those sentenced before the new law comes into effect, and qualifying the proposed law in a similar fashion.

Parole

Many of the proposed amendments to the Parole Act represent improvements over the existing law. The rule under which a parolee whose parole has been revoked receives no credit for time successfully served on parole towards completion of his sentence is to be abolished under the proposed Section 20. Such a parolee will now receive full credit. This rule has been universally condemned as excessive[17] and its abolition is welcomed.

Unfortunately, the Government's proposal here falls to provide adequately for the transition period. Even after this rule is abolished, parolees will continue to be susceptible to the present penalty in respect of the time they have successfully served prior to abolition. In many cases, this could mean years. If the present penalty is considered excessive, there is simply no reason why, after abolition, it should retain a posthumous influence. The Bill should be amended, therefore, to provide full credit for all such parole time successfully served, both before and after the abolition comes into force.

Furthermore, it is proposed to abolish the automatic forfeiture rule that applied to the commission of any indictable offence. This rule was needlessly rigid.

However, the proposals choose to retain the current penalty for parole revocation of loss of statutory remission and to add to it, by abolition of Section 24(2) of the Penitentiary Act and Section 18(2) of the Prison and Reformatories Act, the loss of all remission which had been earned at the time of parole. This latter change is to some extent consequential upon the abolition of statutory remission, but it goes further than that, by an excess of almost 30% in time to be lost. Insofar as the National Parole Board exercises its power to recredit forfeited remission, this will be to some extent mitigated, but not entirely.

The question is whether any sanction for breach of parole is necessary beyond the criminal penalties that will be incurred if the breach involves criminal behaviour and return to the institution if it does not. Of course, the sanction of return to the institution becomes less and less meaningful as the parolee nears the end of his term, but the recommendation of the Task Force on the Release of Inmates that there be some minimum time (their suggestion was six months) that must be served before release becomes mandatory seems preferable. To tie the penalty to remission is to tie it to the length of the original sentence, which may be totally unrelated to the nature of the breach of parole. Indeed, revocation need not be connected to breach of conditions at all, and in such cases a penalty of any sort would be unfair.

A proposal more consonant with what it is legitimate to try to achieve is to provide that a parolee whose parole is revoked must be released at the same time and in the

same manner that he would have been had he not been paroled, except that where this would result in release in less than six months and parole has been revoked for the wilful breach of a condition of parole, the Parole Board shall have the power to extend the release date by up to six months from the time of revocation.

Finally, with respect to the procedures for determining that a parole ought or ought not to be granted or revoked, the proposed law empowers the making of regulations to provide for hearings, discovery, assistance,and reasons. This is a step in the right direction, but we feel that it does not go far enough. The need for the fundamentals of due process in these matters has been recognized in all quarters. The right to a hearing, therefore, ought to be legislatively recognized in principle in every case. The details can be worked out in regulations, but the principle is far too important to be left to regulations.

A Word About Gun Control

Apart from those like the native people who rely on guns as a means of sustenance, the ownership and possession of this weapon rarely involves a serious issue of civil liberties.

The Canadian Civil Liberties Association regrets the extent to which the control of guns has been allowed to obscure the civil liberties threats contained in the other parts of Bill C-83. This is not necessarily to impugn either the defenders or the critics of the gun proposals. It is rather to impugn the Government's action of making Bill C-83 a composite of so many unrelated issues. The grouping of all these matters in one Bill and the speed with which they were rushed through the House of Commons have provided the public with too little opportunity to debate, let alone to digest, the many complex questions involved.

In the interests of attempting to redress as much as we can this imbalance in the public debate, the recommendations in this brief are addressed exclusively to the much neglected but disquieting proposals in the remaining sections of Bill C-83.

The Politics of "Peace and Security"

Despite Government denials, its handling of these issues has generated a widespread belief that Bill C-83 is a political trade-off for the abolition of capital punishment in Bill C-84. Whether such a trade-off is intended or only perceived, the objectionable features of this Bill are not worthy of support. While our organization has long urged the abolition of the death penalty, we regard the trade-off option essentially as a choice between cancer and tubercolosis. In any event, it represents a classic example of the either/or fallacy.

Bills C-83 and C-84 simply do not exhaust the range of alternatives. There is another option available to the Government - the exercise of leadership. By this, we mean the attempt to persuade the public to accept a position which is right in principle. In this context, we believe that entails both the abolition of capital punishment and the rejection of the excessive proposals in Bill C-83.

Political trade-offs are an inevitable and, at times, even a desireable feature of the democratic system. Many social and economic issues are often satisfactorily resolved in the give and take among the various interest groups. But the issues at stake in Bill C-83 involve certain freedoms which are fundamental to the democratic system, itself. How can such freedoms be compromised without corroding the very fabric of our political system? How, for example, is a democrat to choose between the abolition of needless state killing and the expansion of needless state snooping? How far is the needless preventive detention of X an acceptable price to avoid the needless putting to death of Y? This is the kind of ghoulish exercise which is encouraged by allowing the issues in question to be influenced by the "trade-off" mentality.

Admittedly, the role of leadership is often accompanied by difficulties for those who would assume it. But the failure to provide such leadership has often <u>increased</u> the difficulties for those who would avoid it. This could well prove to be the case here. If our prognosis is correct that the adoption of Bill C-83 is not likely to create any significant change in the incidence of crime, what will happen one or two years from now? What will the Government do for an encore? Will it propose, for example, even more electronic surveillance and preventive detention? Will it reduce even further the safeguards which survive this Bill? Or will it finally feel obliged to take the position which was correct from the outset but which may be so much harder to sell later than it is now? In short, the questionable features of this Bill might represent not only a wrong philosophy but even a bad strategy.

Summary and Key Recommendations

On Electronic Surveillance

The very nature of electronic bugging is such that it precipitates pervasive intrusions on the privacy of scores of innocent people. The advocates of expanding the bugging powers of the police and reducing the procedural safeguards of the citizen have failed to demonstrate the necessity for their proposals.

Accordingly, the Canadian Civil Liberties Association respectfully requests the House of Commons Standing Committee on Justice and Legal Affairs to support the following recommendations.

1. The rejection of the additional proposed grounds for permissible electronic bugging.
2. The retention of the police requirement to notify the persons they have bugged .
3. The retention of the judicial discretion to suppress in court the evidence derived from unlawful bugs.
4. The retention of the initial bugging authorization period.

On Dangerous Offenders

The preventive detention contemplated by this Bill represents a needless and dangerous power to exercise over people. On the basis of unreliable predictions, it provides for the incarceration of people not primarily for what they have done but rather for what they are. Yet the regular sentencing power provides ample opportunity to detain for long periods of time, sometimes even for life, those who have committed dangerous acts.

To whatever extent this questionable power of preventive detention is permitted to survive, however, the Canadian Civil Liberties Association respectfully requests the House of Commons Standing Committee on Justice and Legal Affairs to support the following recommendations.

1. The restricted application of this power to only those offenders who are found likely to kill, or cause serious bodily harm or at least severe psychological injury, to other people.
2. The requirement that the triggering offence involve serious violence.
3. The avoidance of any change in the traditional burden of proof.

4. A provision for special treatment facilities.
5. A right in every such prisoner to periodic judicial review with a continuing onus on the authorities to demonstrate the necessity for the detention.

On the Custody and Release of Inmates

The uncertainty resulting from the proposed abolition of statutory remission and its replacement by earned remission would be likely to create unfairness for the inmate and increased tensions for the institution. Moreover, in most cases it is needlessly harsh to provide special penalties for breach of parole.

Accordingly, the Canadian Civil Liberties Association respectfully requests the House of Commons Standing Committee on Justice and Legal Affairs to support the following recommendations.

1. The rejection of the proposal to abolish statutory remission.
2. In the alternative, the inclusion of a safeguard against the retroactive application of any changes in the law of remissions which are disadvantageous to incumbent inmates.
3. The adoption of an amendment to ensure that those whose paroles are revoked receive full credit for all time successfully served on parole, including time served before such amendment takes effect.
4. The abolition of all special penalties for breach of parole except where a wilful breach occurs within six months of the date when the parolee would otherwise have been entitled to release. In such cases, the National Parole Board should be entitled to suspend release by up to six months.
5. The enactment, by legislation rather than by regulation, of a requirement to observe the components of a fair hearing in parole granting and revocation cases.

Footnotes

1. Schwartz, Herman, "Reflections on Six Years of Legitimated Electronic Surveillance", Privacy in a Free Society, (Published by the Roscoe Pound-American Trial Lawyers Foundation, Boston Mass. 1974) pp. 47,48.

2. Schwartz, Herman, "A Report on the Costs and Benefits of Electronic Surveillance - 1972", ACLU Report, March, 1973.

3. Testimony of Ramsey Clark before the Standing Committee on Justice and Legal Affairs, Thursday, July 5, 1973.

4. FBI Annual Report, Fiscal Year 1968.

5. "The Challenge of Crime in a Free Society", 1967, (U.S. Government Printing Office, Washington) p. 198.

6. Ill. Rev. Stat., c. 38, §§ 14-1 et seq, (1965).

7. Lapidus, Edith, Eavesdropping on Trial, (Hayden Book Co. Inc., Rochelle Park, New Jersey, 1974) p.162.

8. 44 Cornell L.Q. 175 at pages 183-4.

9. See Samuel Dash, The Eavesdroppers, (1959), and Stanley Beck, "Electronic Surveillance and the Administration of Criminal Justice", 46 Canadian Bar Review (1968), p.643.

10. For a good discussion of these issues, see Price, "Psychiatry, Criminal Law Reform and the Mythophilic Impulse", [1970] 4 Ottawa Law Review 1.

11. Ennis and Litwack, "Psychiatry and the Presumption of Expertise: Flipping Coins in the Courtroom", vol. 62, No.3. California Law Review 693 (May 1974).

12. Klein, "Habitual Offender Legislation and the Bargaining Process", (1973) 15 Criminal L.Q. 417.

13. cf. Kirkland v. The Queen [1957] S.C.R. 3; Klippert v. The Queen [1967] S.C.R. 822.

14. See Jackson, "Justice Behind the Walls", 1974 2 Osgoode Hall L.J.

15. R. v. Institutional Head of Beaver Creek Correctional Camp, Ex parte MacCaud (1969) 2 D.L.R. (3d) 545.

16. cf. especially the proposed s.24.2(b) of the Penitentiary Act and s. 18.1(b) of the Prisons and Reformatories Act.

17. See Report of the Task Force on the Release of Inmates 1972; Parole in Canada, Report of the Standing Senate Committee on Legal and Constitutional Affairs 1974; Law Reform Commission of Canada, Working Paper 11, Imprisonment and Release.