SUBMISSIONS TO - The Standing Joint Parliamentary Committee

SUBMISSIONS TO - The Honourable Robert Kaplan
Solicitor General of Canada

RE - Security, Intelligence, and
The Report of the McDonald Commission

FROM - Canadian Civil Liberties Association

DELEGATION -

Professor Walter Tarnopolsky
(Past President)

T.C. Douglas
(Vice President)

Professor Ken Swan
(Vice President)

Professor Donald Rowat
(Member, Board of Directors)

Erika Abner
(Research Director)

A. Alan Borovoy
(General Counsel)

Ottawa

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C O N T E N T S

Introduction

The Canadian Civil Liberties Association is a national organization with more than 5000 individual members, nine affiliated chapters across the country, and some forty associated group members which, themselves, represent several thousands of people. A wide variety of persons and occupations is represented in the ranks of our 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 work of the McDonald Commission. In a number of important ways, the security service of the RCMP has encroached upon the fundamental freedoms of the individual.

But what makes these encroachments even more serious is the fact that many of them were unlawful. Democratic institutions cannot long survive such a pattern of police lawbreaking. Nor can they withstand the one other element which has seriously exacerbated this controversy. We refer here to certain government rationalizations of the misconduct at issue. Such a posture erodes public respect for the rule of law. In a viable democracy, neither the police nor the government can be permitted to arrogate to themselves the power to exceed the limits which the law has imposed upon them.

In a number of important areas, the McDonald Commission and various government spokesmen have called for amendments to the law so as to clothe our security personnel henceforth with powers they may have lacked hitherto. In support of these proposals is the claim that national security requires such an expansion of the powers at issue. While the Canadian Civil Liberties Association shares with all responsible citizens the desire to protect the genuine national security needs of this country, we urge nevertheless a response of skeptical scrutiny to many of these demands. The lessons of history demonstrate the ease with which national security has been invoked improperly to curtail personal liberty.

Sometimes such invocation has served the interests of self seeking despots; sometimes it has merely concealed the misjudgments of well-meaning zealots. Whatever the motives, the results have often meant a needless loss of liberty.

Since this brief is addressed essentially to the narrow arena of national security, it takes a restricted position on many of the broad issues it confronts. With regard to a number of investigative techniques, for example, we argue that the security power should be no greater than the general law enforcement power. It should not be assumed from this that we are content with the state of the general law. In many respects, we believe that the existing criminal law grants the police too much power. But a brief dealing with security matters is not the appropriate forum for the exploration of so large an issue. The fulfillment of that objective will continue to occupy us in other contexts.

Moreover, the sheer size of the McDonald Report precludes a response, at this point, to all aspects of it. We do expect, however, to address additional issues in subsequent submissions.

The Mandate

The Canadian Civil Liberties Association very much appreciates the McDonald Commission's sensitivity to the issue of legitimate dissent. The Commission documents and exposes many unwarranted encroachments by the RCMP on the activities of democratic dissenters. The Report's revelations - ranging from the 800,000 dossiers held by the RCMP to the reported surveillance of trade unionists, farm leaders, and the National Indian Brotherhood - provide an invaluable education.

We are also grateful for the Commission's critique of the current security service mandate. The Report contains an incisive analysis of how the provisions of that mandate are capable of generating the kind of improprieties which have occurred. In its recommendations for tightening the powers and terms of reference for the security service, the McDonald Commission has pointed Canadian society in a healthy direction.

Unfortunately, however, the McDonald proposals don't go far enough. They have put us on the right road but have declined to take us the requisite distance. Indeed, in certain respects, they perpetuate some of the fatal flaws in the existing mandate.

The core of the problem is the Commission's failure to face squarely the permissible scope of preventive intelligence gathering. Like the existing mandate, the McDonald recommendations would permit surveillance of "activities directed towards"[1] certain types of security related misconduct. To what extent could such an approach allow investigations of completely lawful "activities" which occur years before the apprehended misconduct? The Commission Report does not adequately answer this question. Indeed, it appears to give contradictory answers.

Where the "activities" at issue are "intended ultimately"[2] to produce the destruction of the democratic system, the McDonald Commission would confine the security service to the use of non-intrusive investigative techniques. As the Commission so admirably expressed it, "so long as political organizations which espouse totalitarian ideologies stick to the methods of liberal democracy... they should not...be subject to intrusive investigations..."[3] Unfortunately, this remark did not end the matter. The Commission hastened to point out that if any such organization became involved in "activities leading to (or directed towards)...terrorism or serious political violence"[4] it should be subject to more intrusive investigations. The problem is that certain "activities" might satisfy both tests. They might be "directed towards" serious political violence and yet comply with the "methods of liberal democracy". Suppose, for example, an incipient revolutionary group restricted its activities, for the moment, to soapbox oratory, literature distributions, and fund-raising in the hope that it could acquire enough support for future resort to violence? The McDonald test makes it very unclear whether such a group would be susceptible now to intrusive surveillance.

On the basis of the words "intended ultimately" the answer might appear to be "no". But, on the basis of the words "activities directed towards" we might reach the opposite conclusion.

The negative answer is reinforced by a further Commission recommendation to insert a special clause limiting surveillance to what is "strictly necessary" for security purposes and requiring that no surveillance be conducted "solely" on the basis of lawful advocacy or dissent[5] But the limiting clause is infected with subjectivity. The interpretations of "strictly necessary" can be as varied as the anticipatory faculties of the people making them. Moreover, while the word "solely" may be necessary, it nevertheless could vitiate the restrictive purposes of the limiting clause. Inevitably, the argument will be made that it is not "solely" the lawful advocacy which triggers the surveillance in question; it is also the suspicion of what the advocacy is 'directed towards".

The less restrictive interpretation of the surveillance power is bolstered by commentary elsewhere in the Commission Report. In discussing the purpose of anti terrorism intelligence gathering, the Commission quotes with approval an author who made the following statement.

> "The primary objective of an efficient intelligence service must be to prevent any insurgency or terrorism developing beyond the incipient stage. Hence a high quality intelligence service is required long before the insurgency surfaces."[6]

The future mandate of Canada's security service cannot afford such ambivalence. The directives must be formulated so as clearly to disavow the breadth of intrusive surveillance permitted by the above quoted statement. The analysis contained in that statement could well encourage the most groundless of anticipatory speculation. When surveillance is addressed to activity "long before the insurgency surfaces", it will almost inevitably embrace completely lawful conduct. The detection of an insurgency so far in advance of its actual emergence may require not only discernment but also clairvoyance. Moreover, when the goal is prevention, the idea is to amass enough intelligence to make reliable predictions. Thus, there could be a tendency to intrude very pervasively on the targets of the investigations - to learn as much as possible about their habits, beliefs, associations, and predilections. It is not hard to appreciate the potentially chilling impact of such an approach on the rights of privacy and dissent.

While there is an understandable attraction in the idea of prevention, there is good reason to doubt how much additional security it really provides. Consider the experience of the RCMP's American counterpart, the FBI. Comprehensive audits performed by the independent General Accounting Office of the U.S. Congress found that, despite a relatively unencumbered mandate, "generally the FBI did not report advance knowledge of planned violence"[7]. In 1974, for example, the GAO estimated that the FBI obtained advance knowledge of its targets' activities in only about 2% of its investigations[8]. And most of this knowledge related to completely lawful activities such as speeches, meetings, and peaceful demonstrations[9]. According to a member of the U.S. Senate Intelligence Committee, "the FBI only

provided...a handful of substantiated cases - out of the thousands of Americans investigated - in which preventive intelligence produced warning of terrorist activity".[10] And a former White House official, with special responsibilities in this area, declared that "advance intelligence about dissident groups (was not)...of much help" in coping with the urban unrest of the 1960's.[11]

Yet, during the period of its broad preventive mandate, the FBI, like the RCMP, perpetrated sweeping violations of civil liberties. Lives were ruined, reputations tarnished, and freedoms emasculated. So wide was the surveillance net that it encroached upon key sectors of the anti war movement, the civil rights organizations, and even the leading humanitarian of the 1960's, the late Dr. Martin Luther King Jr.

Prompted by the paucity of security benefits and the enormity of these civil liberties violations, the U.S. Attorney General in early 1976 laid down a new set of guidelines restricting the scope of the FBI's domestic security operations. Thenceforth, such FBI activity would require "specific and articulable facts" indicating certain types of serious criminal conduct.[12] Although preventive surveillance was not completely curtailed, it was substantially reduced. A subsequent GAO audit found that the FBI was undertaking full investigations only when the apprehended violence was slated to occur "within the foreseeable future".[13] The result was a drastic reduction of the domestic security caseload. In two years, the number of such FBI investigations had shrunk remarkably from 9814 to 642.[14]

Some Canadians, skeptical about the genuineness of these reported changes in the United States, have noted that the FBI operates under classified guidelines when it counters foreign intelligence operations. Perhaps, they suggest, some of yesteryear's domestic operations have simply been redefined as foreign operations? Perhaps also the decline in urban unrest might adequately explain the reduced caseload? But a recent GAO audit specifically found that a major factor in the changed scope of activity was "the interpretation given to the Attorney General's domestic

security guidelines".[15] Indeed, the GAO reported its inability to find any violations of the guidelines or any indications that broader intelligence gathering might be continuing under the guise of other investigations. In accordance with the new policy, the U.S. Attorney General ordered the FBI to stop its more than 35 year old investigation of the American Trotskyists.[16] In the light of all this, it seems apparent that FBI investigative policy has undergone a significant transformation.

If the leading and largest country in the democratic world can function viably despite these restrictions imposed upon the FBI, it is hard to justify the kind of preventive mandate recommended by the McDonald Commission.

The Relevance of the Techniques and the Targets

Two key factors which should influence the exercise of intelligence gathering are the intrusiveness of the technique and the legal status of the target.

In general,as the techniques of surveillance become more intrusive, the standards for permitting them should become more exacting. Accordingly, democratic societies have tended to immunize their citizens from intrusive police encroachment in the absence of evidence of legal violations. Under the Criminal Code, for example, there cannot be wiretaps, entries, searches, seizures, or arrests without reasonable grounds to suspect certain criminal offences. Why, then, so wide an exception for presumed, remote, or even imagined threats to the national security? Why should intrusive surveillance be permissible in the security area for "activities directed towards" certain apprehended conduct even though there may not be a stitch of evidence that the law is being violated?

Consider the case for electronic bugging, one of the most intrusive techniques in the security arsenal. As compared with the other techniques recommended by McDonald, bugging commands the most elaborate enactments in the existing law.

The McDonald Commission would permit electronic bugs to be used where there are "activities directed towards" terrorism and serious political violence in Canada or elsewhere.[17] As indicated above, this might make individuals and groups susceptible to such encroachments even though their activities were currently confined to the "methods of liberal democracy". And, where the violence is anticipated outside of Canada, the potential sweep of this power may be even more frightening. How far, for example, would this proposal allow the Canadian authorities to use electronic bugging against those Christian churches which are politically and financially supporting the revolutionaries in South West Africa and El Salvador? Or, suppose the Solidarity movement in Poland began violently to resist the martial law imposed by the Communist government there? Would this mean that the movement's political and financial supporters in this country could be subjected to electronic eavesdropping? The Commission does say that if such support

activities were conducted openly rather than surreptitiously, they should not trigger intrusive investigations. But the tests which the Commission has proposed do not appear to contain such nice distinctions.

In any event, why does the detection of terrorism or serious political violence require any greater bugging power than is already contained in the Criminal Code? At the moment, the Code permits electronic surveillance for the investigation of more than 40 criminal offences including high treason, intimidating Parliament, sabotage, hijacking, murder, kidnapping, extortion, and even conspiracies to commit these offences both in Canada and elsewhere.[18] What conceivable act of terrorism or serious political violence has been omitted from the list? On the contrary, it might be argued that the bugging power in the Criminal Code substantially exceeds the bounds of demonstrated necessity. But where is the need for anything more?

Beyond the area of terrorism and serious political violence, the McDonald Commission would permit electronic surveillance over "activities directed to or in support of...espionage or sabotage".[19] The problem here is the same. "Activities directed to" may be capable of including lawful conduct which occurs years before the apprehended illegalities. Why is it necessary to permit such pervasive intrusions as electronic bugging on the basis of what may be remote speculation? Why would it not suffice if the bugging powers in this area were confined to illegalities concerning espionage and sabotage? Why shouldn't the power to bug require, at the very least, that there be a counselling or conspiracy to commit these acts? Again, while it might be argued that such a power would include too much, there is hardly a case for anything more.

The Commission would permit electronic surveillance in yet another dubious area - foreign interference. This is defined as "clandestine or deceptive action" taken in Canada by or on behalf of a foreign power to promote that power's interests.[20] While it must be acknowledged that there is a case for intelligence gathering in this area, it must also be remembered that not everything so described is likely

to raise a security problem. Many non-dangerous trade and commercial transactions, for example, may be conducted in a "clandestine" manner. Moreover, not all such "clandestine or deceptive action" is unlawful. In our view, if conduct is not considered sufficiently dangerous to warrant a legal prohibition, there is a real question whether it should suffice to trigger intrusive surveillance. Some democratic countries require the agents of foreign powers to undergo a procedure of registration so that they might be readily identified as such. In that way, their activity would be less deceptive and clandestine. In the United States, for example, certain forms of intrusive surveillance are permitted against individuals, reasonably suspected of being foreign agents, who have failed to comply with the legal requirements of registration. These registration laws have been criticized by some as excessive and by others as unworkable. For the moment, we make no recommendations on this point. Suffice it for us to insist that the prerequisite for intrusive surveillance in this area is the creation of an offence, carefully and narrowly confined to genuine and serious security dangers.

To a very great extent, the American experience reinforces our misgivings about the wide preventive bugging powers which McDonald has recommended. Where domestic security threats are concerned, American bugging since 1972 has been done entirely under the authority of a general statute which requires probable cause to believe that certain criminal offences are involved.[21] Where foreign security threats are concerned, the U.S. Congress in 1978 enacted a special statute which employs a similar standard for the bugging of American citizens and resident aliens within the United States.[22] Even more significant is the relative lack of effort on the part of the administration or the Congress to broaden this power any further. In the light of these circumstances, how can Canada justify so much additional bugging authority? Accordingly, we propose that, for security purposes, electronic surveillance should require, at the very least, reasonable grounds to suspect past or current participation in a serious security-related breach of the law.

Subject to what we say later about informants, we believe that the standards adopted for electronic bugging should become the absolute floor below which the standards for employing other intrusive techniques should not be allowed to drop. At the moment, certain other surveillance techniques require even

higher standards. In the case of opening undelivered mail, for example, the law prohibits it, almost without exception. We are not satisfied that a case has been made for any of the McDonald proposals to expand the current powers in relation to this and the other intrusive techniques[23] such as surreptitious entry and access to income tax files. In our view, before any such expansion is considered, the need for it should be more substantially demonstrated than has been done heretofore. We plan in subsequent submissions to address each of these matters in greater detail. Suffice it, at this point, to urge a policy of containment. As far as intrusive intelligence gathering is concerned, no new powers should be added and the existing powers should be reduced to the standards recommended above.

There is an argument for a somewhat limited exception in the case of informants, a surveillance technique virtually unregulated in the existing law. Unlike the other forms of intrusive intelligence gathering, the use of informants may require more lead time. As the U.S. General Accounting Office once observed, some of the target groups will be "difficult to penetrate because of their elaborate security procedures and cell-like organizational structures".[24] The GAO believed that there may have to be a period of observation and contact in order for an informant to gain a group's trust. These considerations might create an arguable case for a somewhat more flexible standard where informants are concerned. Perhaps, therefore, it would be permissible to target informants at individuals or groups where there are reasonable grounds to anticipate a serious security-related breach of the law within the near future. Such a standard would provide a little more leeway for informants than the Criminal Code permits for electronic bugging. At the same time, however, it would restrict the kind of overbroad standard recommended by the McDonald Commission.

The legal status of the proposed target must also influence a person's susceptibility to surveillance. This country owes its greatest protections to citizens and permanent resident aliens. It cannot incur the same obligations to those who are

visiting temporarily as it does to those who are staying indefinitely. There may also be practical reasons for a difference in investigative thresholds. The brevity of a visitor's stay in this country might make it much more difficult to accumulate the requisite evidence of unlawful conduct. Moreover, experience indicates that, compared to citizens and residents, a significantly higher proportion of visitors is involved in foreign intelligence activity.[25]

In an attempt to reduce inequalities, the McDonald Commission impugned the idea of having different standards for foreign nationals. Unfortunately, however, the Commission's solution was to propose needlessly loose standards for everyone. In view of the differing practical and ethical considerations, we believe that a case can be made for differing thresholds. Accordingly, we would allow a somewhat broader and more preventive approach in the case of foreign visitors. But, even at that, it need not be as broad as the scheme recommended by the Commission. We would allow otherwise permissible intrusive techniques to be used on foreign nationals in situations where the apprehended misconduct is reasonably believed likely to occur within the near future.

It should be noted here that, while we would provide greater protections for citizens and permanent residents, our recommended standards are tighter for everyone than the ones proposed by the McDonald Commission.

Recommendation No.1 Require that citizens and permanent residents not be subjected to electronic surveillance, for security purposes, unless there are reasonable grounds to suspect past or current participation in a serious security-related breach of the law.

No.2 Require that foreign visitors not be subjected to electronic surveillance, for security purposes, unless there are reasonable grounds to suspect a serious security-related breach of the law in the near future.

No.3 a) Except for informants, reduce the existing powers in relation to other intrusive techniques so that they will require standards no looser than those which apply to electronic bugging.

b) In any event, resist the expansion of any such powers beyond what is permitted in the existing law.

No.4 Require that, for security purposes, informants not be targeted at individuals or groups unless there are reasonable grounds to anticipate a serious security-related breach of the law within the near future.

Structure and Controls

The Canadian Civil Liberties Association is concerned about the wisdom of the McDonald proposal for a new civilian agency to perform Canada's security functions. The further that security surveillance is removed from the discipline of law enforcement, the greater the risk of blurring the line between improper subversion and legitimate dissent. The virtue of the law enforcement approach, for these purposes, is its focus on gathering evidence of relatively defineable crime. So long as illegal conduct is the subject of investigative activity, there is less risk of snooping on legitimate dissenters. But, when security surveillance is divorced from law enforcement, investigations are more likely to involve vaguer, broader, and less defineable matters. This is what could imperil legitimate dissent.

We recognize, of course, that certain security investigations, by their very nature, will involve comparatively few law enforcement considerations - the screening of some potential citizens and government employees who will have access to classified information. In such cases, however, the target will usually consent to having himself investigated. Indeed, such consent will often be a condition of his entitlement to the position he seeks. Our primary concern here is to protect the people who do not wish to be investigative targets. They are the ones whose effective liberty and privacy are most at risk.

In this connection, the American experience becomes instructive. In the mid 1970's, when the Americans confronted the enormity of the civil liberties violations perpetrated by the FBI, they, like us, had to determine the direction which reform ought to take. Instead of creating a civilian security agency divorced from law enforcement, the Americans moved in the diametrically opposite direction. They amalgamated the FBI's domestic security investigations with its general criminal investigative division. The "express purpose" of this move, in the words of the then FBI director, was to handle domestic security cases as much as possible "like all other criminal cases".[26] In short, the narrower focus of criminal investigations was less likely to intrude on lawful dissent.

This is not necessarily an argument for leaving the security function within the RCMP. Indeed, it appears that the creation of a separate agency has already become a fait accompli. At this point, we would recommend that the new agency acquire a central law enforcement responsibility for security-related offences. If that were done, Canada would have two federal police forces - one handling security matters, such as espionage, sabotage, and terrorism, and one handling more general criminal investigations such as customs, excise, drugs. In suggesting this approach, we do not foreclose on the possibility that there may yet be other acceptable combinations of structures. In any event, the essence of our concern here is that security surveillance be tied as closely as possible to law enforcement.

Recommendation No.5 Resist the proposal for Canada's security functions to be performed by an all civilian agency, entirely divorced from law enforcement.

In many ways, the strongest feature of the McDonald Report is the series of recommendations it makes for controlling security and intelligence activity. In addition to its recommendation for greater ministerial supervision, the Commission calls for an outside advisory council, a parliamentary committee, and judicial warrants for the most intrusive intelligence gathering techniques.

The advisory council would be composed of persons independent of government and the security agency. It would have access to all files and operations. Its function would be to audit security operations and report apparent problems to the Solicitor General. Instead of facing only the pressures emanating from security personnel, the Solicitor General would then have to deal also with the competing pressures from the advisory council. The resulting tensions would help to keep the Minister from taking the path of least resistance.

By recommending also the involvement of a parliamentary committee, the Commission is addressing the risk that the advisory council might become socialized by the officials it has to investigate. The involvement of opposition M.P.'s on the parliamentary committee would help to prevent this from happening. While the Solicitor General would retain the legal power to use his own discretion in the resolution of possible conflicts, he would be impelled politically to make compromises with those who are exercising these oversight functions. In view of the various interests, functions, and perspectives involved in the process, the resulting compromises would probably strike as reasonable a balance as any alternate arrangements could hope to produce.

One of the most disquieting defects in the existing arrangements is the unilateral power of the Solicitor General to authorize intrusive surveillance 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 would not be perceived that way. As politicians, they will frequently be suspected of having acted on the basis of political rather than security considerations.

As indicated, 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 in such matters can be made by the government of the day, this could create anxiety among its political competitors. In fact, the mere existence of this power could in time inhibit and intimidate various manifestations of legitimate social and political protest.

For these reasons, we welcome the McDonald proposal that intrusive surveillance require judicial warrants. No court would be likely to refuse a warrant in a compelling case. But, being more independent of the political process, it might well be more demanding as to the purpose, duration, and terms of the warrants it issues. Indeed, we believe that the courts should be explicitly required to impose such conditions on the surveillance activity they approve. There is reason to believe also that the mere requirement of judicial permission could

serve to deter the government from even requesting surveillance warrants in some unjustified cases. We fully recognize that such a safeguard could well degenerate into an illusory ritual. We urge its adoption, not out of faith in its effective sufficiency, but in the conviction that it is a minimum necessity.

The Canadian Civil Liberties Association warmly endorses the McDonald proposals for the scrutiny and control of security activity. In many ways, they represent the most important features of the Report. Weak controls can distort a strong mandate but strong controls can improve a weak mandate. We call upon the federal government, therefore, to undertake the early implementation of the McDonald recommendations in this area.

Recommendation No.6 Implement the McDonald Commission proposals for the scrutiny and control of security activity including greater ministerial supervision, an independent advisory council with access to all security material, a parliamentary committee containing opposition members, and judicial warrants for the most intrusive intelligence gathering techniques.

The Issue of Police Lawbreaking

More than anything else, the McDonald Commission owed its creation to the revelations of RCMP lawbreaking. No democratic society could afford to be unresponsive to so serious a matter.

In many ways, however, the policy of the Federal Government represents the worst aspect of this unhappy episode. When the nature and scope of the lawbreaking first became public, government spokesmen failed to criticize it in clear terms. Indeed, many government statements at the time sounded like justifications for the police misconduct. Moreover, the government failed to treat RCMP lawbreaking by the same standards as it normally treats comparable behavior in the civilian sector of the community. Instead of invoking the normal processes of law enforcement, the Federal Government dumped the entire matter in the lap of the McDonald Commission. As a consequence, the wrongdoers have enjoyed several years of de facto immunity.

After more than four years, millions of words of testimony, and ten million dollars, too little has changed. Following the late summer publication of the McDonald Report (volumes 2 & 3), there was another round of confusing government rhetoric about the police obligation to obey the law. And, outside the Province of Quebec, not a single charge has been laid or disciplinary measure imposed.

This time a number of the questionable statements emanated from press conferences held by the Solicitor General. On the basis of two legal opinions which the government had commissioned following its receipt and before publication of the McDonald Report, the Solicitor General reportedly proclaimed the right of police officers to break the law in a wide variety of circumstances. Some of the views so espoused appeared to conflict with the legal opinions of the McDonald Commission. While legal experts may well differ, public respect for the rule of law is certainly undermined by this apparent circumvention of the ten million dollar opinion submitted by the McDonald Commission. Whether or not one agrees with the Commission's

view of the law, it must nevertheless be acknowledged that such an opinion is entitled to great weight and respect. In the circumstances its advice should not be dismissed. The consequence of this approach has been to compound public confusion about whether the rule of law would be applied to this country's constabulary.

Many of these government pronouncements were as misconceived as they were unwise. In one case, for example, it was contended that a police officer would be permitted to steal a boat in order to save someone from drowning. But, in such a situation of imminent peril, anyone, not only a police officer, could likely avail himself of the common law defence of necessity against a possible charge of theft. There was also a suggestion that Mounties could break certain provincial laws such as those dealing with speeding on the highways and the requirement of truthful registration in hotels. But why describe such a situation as a right in the police to break certain laws? At most, there might be an argument that some provincial laws do not apply to agents of the federal government to the extent that the conduct at issue is necessary to the performance of their federal obligations. Where there should have been clarity and precision, the Canadian people were treated to overbroad generalities and dangerous confusion.

In the opinion of the Canadian Civil Liberties Association, these government statements were also unnecessary. The federal government enjoys a substantial majority in the House of Commons. To whatever extent there is a demonstrated need for additional police authority, the matter should be referred to Parliament (and perhaps certain provincial legislatures). Where the issue involved represents nothing more serious than the kind of regulatory matters mentioned earlier, the applicable laws could probably be amended with relatively little difficulty. In such situations, surely it would be better to pursue the route of legislative amendment than to conjecture interminably about permissible law breaking.

We urge, therefore, the adoption of the following recommendations.

Recommendation No. 7 Make clear public statements requiring the obedience, of police and civilian alike, to the laws of this country.

NO. 8 a) Accept as valid the legal opinions of the McDonald Commission concerning the permissible scope of police conduct within the existing law.

b) To whatever extent there is a demonstrated need for additional scope, provide for it by seeking amendments to the existing law.

As far as the prosecution and disciplining of RCMP wrongdoers are concerned, the involvement of the McDonald Commission may actually have made matters worse. Contrary to many public expectations, the Commission turned up very little evidence relating to the hundreds of offences which the RCMP had been accused of committing. Indeed, during the final hearings, the Commission pointed out that it had not even investigated many of these matters.

At the appearance of the Canadian Civil Liberties Association, during the summer 1980, Mr. Justice McDonald made the following statement about the allegations of surreptitious entry.

> "...I would not want you to be under any misapprehension that this Commission is sitting on some huge volume of evidence as to what specific individuals in specific cases have done or planned to do...
>
> I am concerned that anyone,...is under some misapprehension that we have had a large number of investigators interviewing members of the RCMP for days and days and months, to find out about individual instances. That has not been the case and it would not have been humanly possible".[27]

And, apart from certain limited incidents such as the barn burning and the dynamite theft, Mr. Justice McDonald said that the same situation applied to most of the other matters which the Commission had under review - access to confidential information, mail opening, violations of provincial statutes, etc.[28]

These comments simply do not square with the impression that the Federal Government created during the period when RCMP wrongdoing became public. When asked why no charges had been laid in connection with illegal mail opening, for example, former Justice Minister Basford replied as follows:

> "....for the very simple reason that any facts or reports I have seen do not contain the precise type of information that is required in the laying of charges against specific officers or constables. That is one of the precise purposes of the hearings of the McDonald Inquiry, to put before them facts with sufficient precision so that if charges can be laid, they will be laid".[29]

And, commenting more generally on allegations of RCMP wrongdoing, former Solicitor General Francis Fox made the following statement.

> "There are other allegations which have been made against the Force and they have all been referred to the Royal Commission in order that they may produce the evidence".[30]

Even the McDonald Commission itself had helped to fuel this impression. When CCLA was urging the Commission in January of 1978 to recommend the immediate invocation of normal law enforcement processes in these matters, Mr. Justice McDonald expressed certain reservations. As to the wisdom of transmitting evidence to the Provincial Attorneys General, for example, he posed the following questions.

> "Would not any,..provincial Attorney General, in effect, at least in the provinces where the RCMP is the contracted police force, not have to form his own task force of investigators and lawyers? If that is so, isn't that exactly the kind of machinery which a Commission of this sort attempts to put together and does put together albeit with some difficulty....Would any Provincial Attorney General be as readily able as this Commission is to reach across provincial boundaries?"[31]

Would not a reasonable listener and reader of those words be led to believe that the Commission, in fact, would investigate a substantial number of the allegations against the RCMP? For these reasons, we believe the situation is now worse. More than four years ago, the Federal Government admitted that the RCMP had been involved in hundreds of cases of illegal activity. The RCMP did not investigate; the Federal Government did not investigate; the Provincial Attorneys General were not given enough information to investigate; and it appears that the Commission may have conducted only a few such investigations. We are unable to determine how far this situation is attributable to design or neglect. And we do not know who is primarily responsible. What we do know is that more than four years later, the evidence will now be a lot harder to acquire.

In any event, the Federal Government is obliged at this point to do all it can to correct the situation. At least within its jurisdiction (illegal access to tax records, mail opening, etc), the Federal Goverment should invoke the regular processes of law enforcement. Subject to the exercise of normal prosecutorial discretion, charges should be laid and disciplinary measures should be launched in those cases where there is a reasonable basis to believe that the law has been broken.

Since it appears that some of the accused officers may plead that they were under orders from superiors, we believe that an independent prosecutor should be appointed. While the existence of superior orders may not constitute a defence to a charge, it might influence a prosecutor to be lenient to the extent that the potential accused cooperated in identifying more culpable superiors. It is conceivable, therefore, that the process might reach into the upper echelons of the RCMP and perhaps even to the Cabinet. Because of the possible vulnerability of some of the political masters, the prosecutorial decisions should be made by someone who is not under their on-going control.

The failure to invoke the normal processes of law enforcement could incur some serious risks. It could persuade large sectors of the public that there are double standards in this country, that civilian lawbreaking is punishable but RCMP lawbreaking is not. The most likely result would be an erosion of confidence in the administration of justice. To whatever extent some constituencies can break the law with impunity,others may be encouraged to believe they should be able to do likewise.

The failure to apply a single standard could threaten to unravel our voluntary infrastructures. Consider, for example, the position of the Canadian Labour Congress during the fall 1978 strike of the Canadian Union of Postal Workers. Despite a common and bitter opposition to the special act of Parliament terminating the strike, the CLC declined to support CUPW at the point when the latter's action became unlawful. As the public knows, CLC President Dennis McDermott was

vigorously attacked for his stand by significant elements of his own constituency. What will this country say to its Dennis McDermotts the next time they face such movements to defy the law? Indeed, so long as RCMP wrongdoers remain immunized, what can anyone say?

Moreover, a firm policy of prosecution may be necessary to ensure public confidence in whatever reforms are recommended by the government and enacted by Parliament. So long as the past wrongdoers avoid the processes of justice, why should anyone trust that amended laws will be enforced more conscientiously than the existing ones?

Recommendation No. 9. Subject to the exercise of normal prosecutorial discretion, lay charges and launch disciplinary measures against those members of the RCMP and government who are reasonably suspected of violating those laws which lie within the federal jurisdiction to enforce (access to tax records, mail opening, etc.)

No.10. Appoint an independent prosecutor to handle this assignment.

Summary of Recommendations

The Canadian Civil Liberties Association recommends that the Federal Government adopt the following measures.

1. Require that citizens and permanent residents not be subjected to electronic surveillance, for security purposes, unless there are reasonable grounds to suspect past or current participation in a serious security-related breach of the law.

2. Require that foreign visitors not be subjected to electronic surveillance, for security purposes, unless there are reasonable grounds to suspect a serious security-related breach of the law in the near future.

3.a) Except for informants, reduce the existing powers in relation to other intrusive techniques so that they will require standards no looser than those which apply to electronic bugging.

b) In any event, resist the expansion of any such powers beyond what is permitted in the existing law.

4. Require that, for security purposes, informants not be targeted at individuals or groups unless there are reasonable grounds to anticipate a serious security-related breach of the law within the near future.

5. Resist the proposal for Canada's security functions to be performed by an all civilian agency, entirely divorced from law enforcement.

6. Implement the McDonald Commission proposals for the scrutiny and control of security activity including greater ministerial supervision, an independent advisory council with access to all security material, a parliamentary committee containing opposition members, and judicial warrants for the most intrusive intelligence gathering techniques.

7. Make clear public statements requiring the obedience, of police and civilian alike, to the laws of this country.

8.a) Accept as valid the legal opinions of the McDonald Commission concerning the permissible scope of police conduct within the existing law.

b) To whatever extent there is a demonstrated need for additional scope, provide for it by seeking amendments to the existing law.

9. Subject to the exercise of normal prosecutorial discretion, lay charges and launch disciplinary measures against those members of the RCMP and government who are reasonably suspected of violating those laws which lie within the federal jurisdiction to enforce (access to tax records, mail opening, etc.).

10. Appoint an independent prosecutor to handle this assignment.

Footnotes

1. Record of Cabinet Decision at meeting of March 27, 1975. "The Role, Tasks and Methods of the RCMP Security Service."
2. Commission of Inquiry Concerning Certain Activities of the Royal Canadian Mounted Police, Freedom and Security Under the Law Second Report Volume 1 (Ottawa: Queen's Printers, 1981), at 441.
3. Id.
4. Id.
5. Ibid., at 443.
6. Ibid., at 436, quoting Paul Wilkinson, Terrorism and the Liberal State (Toronto: MacMillan/MacLean-Hunter), at 133-135.
7. U.S. Congress, Senate, Final Report of the Select Committee To Study Governmental Operations With Respect to Intelligence Activities, Report No. 94-755, 94th Congress, 2nd Session, 1976, Book II, at 19.(Frequently referred to as the Church Committee Report).
8. Id.
9. Ibid., at fn. 108.
10. Ibid., at 359.
11. Ibid., at 19.
12. John T. Elliff, The Reform of FBI Intelligence Operations (Princeton, New Jersey: Princeton University Press, 1979), at 190.
13. U.S., General Accounting Office, Report of the Comptroller General of the United States, FBI Domestic Intelligence Operations: An Uncertain Future, November 9, 1977, at 19.
14. Ibid., p.17.
15. Ibid., p.15.
16. Supra fn. 12, at 78.
17. Supra fn. 2, at 555.
18. The Criminal Code, R.S.C. 1970, Chap. C-34, s. 178.1.
19. Supra fn. 2, at 441.
20. Id.
21. Omnibus Crime Control and Safe Streets Act, Title 111, 18 U.S.C. § 2516.
22. Foreign Intelligence Surveillance Act of 1978, Title 1, sec. 101-102.
23. For a somewhat fuller discussion of our views about mail opening, surreptitious entry,and access to tax files, see the CCLA brief to the McDonald Commission entitled Toward a Charter for the Royal Canadian Mounted Police, presented on April 17, 1980. We also acknowledge there that somewhat less exacting standards could be appropriate for the use of less intrusive surveillance techniques such as watching, trailing, source checking,and interviewing.