AMENDING THE PROTECTION OF PRIVACY ACT

SUBMISSIONS TO

The Honourable Ron Basford
Minister of Justice of Canada

FROM

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Introduction

This coalition was forged in the wake of two recent developments.

- the bugging of the Sault Ste. Marie courthouse
- the Government's proposed amendments to the *Protection of Privacy Act*.

As lawyers and representatives of constituencies concerned with criminal justice, we found that we shared considerable disquiet about our wiretap legislation. At Sault Ste. Marie, it had permitted the invasion of one of the most privileged communications known to our legal system. Further discussion revealed, however, that Sault Ste. Marie might prove to be just the tip of the iceberg. Numbers of our colleagues have been complaining for some time, that the fear of surveillance has made them reluctant to consult with their clients on their telephones and in their offices. And, even apart from the solicitor-client relationship, we found a shared concern about the apparently growing number of cases in which electronic surveillance has been used as a police investigative technique.

In the light of this background, it will be appreciated that the Government's proposed wiretap amendments have only increased our concerns. If enacted into law, these amendments would expand the surveillance powers of the police and reduce the protective safeguards for the citizen. From our point of view, such a change would intensify even further the existing imbalance in the *Protection of Privacy Act*.

It was in the hope of forestalling such a development that the signatories to this brief joined forces and sought this meeting.

The Dragnet Impact

The recent wiretap incident at the Sault Ste. Marie courthouse dramatizes the dragnet character of electronic surveillance. In the course of conducting such surveillance against one Sault Ste. Marie lawyer who was suspected of criminal activity, the police there undoubtedly overheard the private conversations of many other lawyers with their clients. Thus, it is likely that much of the wiretapping in this case contributed absolutely nothing to the matters under investigation. Yet it would have undermined one of the most important safeguards in our society - the right to consult freely with legal counsel.

Herein lies a major impediment with electronic bugging. Invariably, not only guilty and suspected people have their private conversations monitored but also a wide range of people who may have nothing to do with the matters at issue. An examination of recent U.S. experience, for example, reveals that to date some 1500 people have been convicted of offences arising out of cases involving electronic surveillance in 1969 and 1970. During the course of this bugging, however, the American authorities overheard more than 40,000 people in more than a half a million conversations. Undisputably, the overwhelming number of these people were innocent of wrongdoing. It is difficult, however, for the bugs to discriminate. They tend to catch everyone within earshot -- the guilty, the suspected, and the innocent alike.

For these reasons, we believe the Government's proposed wiretap amendments represent a regrettable response to the problems involved. Apart from the welcome restrictions on the bugging of places ordinarily used by solicitors, nowhere do these amendments even confront the dragnet impact of electronic surveillance. On the contrary, the Government Bill would increase even further the ambit of permissible surveillance and decrease even further the safeguards for personal privacy.

Unfortunately, the new restriction on the bugging of places used by solicitors could not even cope with the Sault Ste. Marie incident which triggered it. Such places would be rendered off limits to electronic bugging unless a court were satisfied "that there are reasons to believe...any...such solicitor (or an associate)...has been or

is about to become a party to an offence". But this is precisely the situation which obtained at Sault Ste. Marie. The bugging of the courthouse was authorized as part of the investigation of a solicitor who was under suspicion. Even if all of these Government amendments had been in force at that time, there would have been nothing to prevent the eavesdropping which took place on the conversations of all the other lawyers and their clients. At a minimum, in our view, the law should be further amended so as to prohibit the interception of privileged communications beyond those which a court has expressly authorized. Moreover, if any such communication not so authorized is intercepted by mistake or otherwise, the law should require the immediate destruction of all recordings and representations thereby produced.

In response to the other dragnet effects of electronic surveillance we believe that, at the very least the Government should have dealt with the issue of public disclosure. Under the present law, there is no guarantee that the public at large will even learn about how wiretapping affects innocent people. The requirements to disclose and report fail to address this vital question.

The public acquisition of such crucial information should not have to depend upon the accidental exposure of incidents like the one at Sault Ste. Marie. Our wiretap laws cannot properly be evaluated unless the public can weigh the costs to the privacy of the innocent as well as the benefits from the apprehension of the guilty. Unfortunately, however, these costs are simply not revealed under the existing arrangements.

Such considerations impel us to recommend an expansion of the reporting requirements under the Criminal Code. In our view, the public reports should be required to disclose, for each surveillance authorization the number of people and the number of communications which have been electronically intercepted.

We are hopeful that the adoption of such a measure would serve also as a partial deterrent to excessive wiretapping. The prospect of having to reveal a large gap between the number of persons apprehended and the number of persons intercepted may impel more police departments to develop better techniques for minimizing

needless interceptions. It might also reduce, in the first place the number of requests for wiretap authority. At the very least, however, such publication would enable the public more adequately to evaluate the costs and benefits of this contentious practice.

While there are many more amendments we would like to recommend for this controversial law, it is essential at this point that we address ourselves to the amendments which the Government is seeking. Even as revised in the spring of this year, the Government Bill represents a retrograde step.

The Expanded Grounds

The proposed grounds for permissible bugging continue to reflect a disturbing insensitivity about the enormity of what is involved. As we have indicated electronic surveillance usually invades the privacy of scores of people beyond those who are guilty or even suspected of criminal activity. For this reason, we believe that necessity, rather than mere utility, should be the test of its acceptability. The question should not be whether bugging is necessary to apprehend a particular offender, but rather to what extent, if at all, it is necessary for the adequate protection of society.

In our view, there is no basis whatever to believe that the possibility of bugging in respect of the matters designated in the Government Bill is indispensable to the adequate protection of Canadian society. Indeed, it is hard to believe that the Government ever addressed itself to this question.

The strongest argument for electronic bugging has concerned its alleged role in combatting organized crime. Unfortunately, the statutory 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 bootleggers. 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. Significantly, among the experts on organized crime, there are serious divisions about the need to bug. Consider, for example, the special strike forces which were established to fight organized crime in the United States. The coordinator of one of the most successful strike forces 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".

But neither the existing law nor the Government's revised amendments can claim the virtue of attempting to limit bugging to organized crime. Indeed, if the Government's amendments are enacted, it will be possible for the police to bug in respect of "any offence created by an Act of Parliament for which an offender may be sentenced to imprisonment for five years or more" <u>whether or not organized crime is involved</u>. On the basis of this amendment, bugging warrants potentially could issue even for mere possession of marijuana. While we have no reason to believe that the police are eagerly awaiting the opportunity to eavesdrop in respect of such a matter, we cannot conceive of any rational basis for making it legally possible.

And why should the suspicion of keeping a gaming or betting house give rise to the pervasive intrusions on personal privacy which are involved in electronic surveillance? Such offences, unassociated with organized crime, could hardly qualify as threats to the "peace and security" of the Canadian public.

<u>The Reduced Safeguards</u>

The reinstatement of <u>some</u> notice requirement is, of course, less bad than the removal of <u>all</u> notice requirements.

But a three year moratorium on the need to notify cannot reasonably be given at any stage of the proceedings. At any point during a three year period, circumstances can radically change. The courts should not be asked to exercise such long-term

clairvoyance. In view of the pervasive threats to privacy which are involved in electronic bugging, notification should not be dispensed with unless the courts are involved in a position of continuing supervision.

A delay of three years could defeat one of the purposes of the notice requirement. Among other things, this safeguard is designed to enable the victims of improper bugging to take remedial action. The longer notice is delayed, however, the more difficult it will be for the parties to remember the circumstances recorded. Such delays could also make it increasingly hard to find witnesses and documents.

While there may be some circumstances in which the interests of notifying the person under surveillance may have to give way for longer periods to the interests of secret investigations, elementary fairness requires that such delays be constantly reviewable. In this respect, we believe that even the suggestion of the Canadian Association of Chiefs of Police is far preferable to the amendment proposed by the Government. During his testimony before the Justice Committee, Chief Harold Adamson suggested that the courts might be empowered to suspend the requirement of notice for ninety days at a time up to a limit of so many years. While less than satisfactory from our point of view, this idea strikes a far more reasonable balance between the safeguards for suspects and the efficiency of investigations.

Regrettably, the Government's revised amendments contain no change in regard to the problem of derivative evidence from unlawful bugs. Unless such evidence is at least suppressible, as a practical matter, unlawful bugging will never even be discovered. Because of the surreptitious nature of electronic surveillance, it is usually conducted without the suspect's knowledge. At the moment, there is at least one practical way of finding out about illegal wiretaps. Since the derivative fruits from unlawful bugs are subject to suppression, it is open to the accused at his trial to cross-examine police evidence in order to establish or to determine whether bugging played any part in it. If the Government's Bill on this issue is enacted without further amendment, the trial of the accused will no longer provide a forum for uncovering unlawful bugs. Cross-examination for such purposes will be impermissible because it will no longer relate to any relevant issue at the trial.

Action to uncover any possible unlawful bugging by the police will require, therefore, that the accused or the police, themselves, take separate initiatives. The experience with such initiatives in this country could hardly inspire public confidence.

It represents no disrespect for the great majority of Canada's police forces to insist that, as far as prevention of unlawful police bugging is concerned, trusting relationships are no substitute for viable safeguards.

The Government proposes also to extend the initial bugging authorization period from a maximum 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.

Summary

Invariably, electronic bugging precipitates pervasive intrusions on the privacy of scores of innocent people. The advocates of expanding these surveillance powers of the police and reducing the procedural safeguards of the citizen have failed to demonstrate the necessity for their proposals.

To the extent, therefore, that the proposed wiretap amendments contain such increases in the powers and decreases in the safeguards, we request the Government of Canada to withdraw them. At a minimum, this would mean the following:

1. the rejection of the additional proposed grounds for permissible electronic bugging
2. a) the retention of the existing police requirement to notify the persons they have bugged
   b) in the alternative, a provision that the courts be empowered to relax this requirement for periods of 90 days up to a limit of 3 years
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

Moreover, as a partial response to the dragnet character of electronic surveillance, we request the Government of Canada, at the very least, to adopt

5. a) a prohibition against the interception of privileged communications beyond those expressly authorized by a court
   b) a provision that all recordings produced from any such interceptions not so authorized be destroyed forthwith
6. a requirement that the public reports disclose, for each surveillance authorization, the number of people, and the number of communications which have been electronically intercepted.

Respectfully submitted

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