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May 25, 2007

By fax and mail

The Honourable John Major
Commission of Inquiry into the Investigation of
the Bombing of Air India Flight 182
#401 - 222 Queen Street
Ottawa, Ontario
K1P 5V9
Fax: 613-995-3506

Dear Sir:

The Canadian Civil Liberties Association (CCLA) very much appreciates the standing that you have accorded the organization for the purpose of participation in the inquiry. Pursuant to that objective, I am writing at this point to express the views of the organization in connection with a key item in your terms of reference.

An issue that has bedevilled the Air India calamity concerns the state of co-operation between the Canadian Security Intelligence Service (CSIS) and the Royal Canadian Mounted Police (RCMP) during the course of the investigations. There have been allegations and accusations that these agencies failed to consult, inform one another, transmit relevant material, and provide necessary assistance. According to one media report, for

example, an RCMP official charged that the "Mounties could have solved the case much sooner if CSIS had retained tapes of [certain] intercepted conversations ...". A published book on the subject attributes to an RCMP official the allegation that "charges could have been laid years earlier if the [CSIS] tapes had been preserved". In Bob Rae's report, there is a suggestion that "much of the information ... CSIS had obtained through its investigation was not promptly shared with the RCMP".

Of course, this Inquiry will ultimately be assessing the validity of these various perspectives and points of view. Suffice it for now to acknowledge the existence and persistence of the allegations and counter-allegations.

In any event, small wonder that the terms of reference for this Inquiry include an examination of possible "problems in the effective co-operation between government departments and agencies, including the Canadian Security Intelligence Service and the Royal Canadian Mounted Police ...". In furtherance of this theme, the Inquiry has been asked to consider how to prevent a "recurrence of similar problems ... in the future".

It is virtually axiomatic that many of these problems in institutional relationships would be ameliorated if the functions of law enforcement and intelligence gathering were housed in the same agency. Jurisdictional disputes, turf wars, and organizational jealousies would be less likely to develop and, in any event, could be more readily overcome if both of these functions were responsive to a central command.

Significantly, the driving force between the separation of intelligence gathering from law enforcement was not security; it was civil liberties. The

separation grew out of the recommendations of the McDonald Commission on RCMP Wrongdoing.

That Commission came into existence, not because the RCMP had failed in some conspicuous way to protect the national security, but rather because, in its zeal for security, it had overreached and committed some serious violations of civil liberties. The events that spawned the McDonald Commission included RCMP surveillance of legitimate dissenters (eg. the Parti Québecois, the Waffle faction of the New Democratic Party, the National Black Coalition, and the National Farmers Union), some 30 years of illegal mail openings by the RCMP, and reports that the Force had committed burglary, theft, arson, and the unlawful invasion of confidential records.

In the opinion of the Canadian Civil Liberties Association, the interests of civil liberties never required the separation of functions recommended by the McDonald Commission and adopted by the government of Canada. Indeed, our organization has consistently advanced the view that such separation constitutes a potential *harm* to civil liberties.

The further that intelligence gathering is separated from law enforcement, the greater the risks to civil liberties. The possibility of becoming involved in a prosecution could help to discipline an investigative agency. Law enforcement agencies must anticipate intense scrutiny of their material by partisan defence counsel in open court. No one would expect comparably rough treatment by impartial judges at the *in camera* hearings for warrant applications. The defence lawyer would be trying to discredit the material; the judge would simply be reviewing it. Moreover, the defence counsel would likely know a lot more about the case than would a judge. Thus, the

anticipated use of material for subsequent prosecutions would help to restrain the investigators from engaging in conduct that could undermine their case.

The intelligence agency that also had law enforcement functions could well wind up laying charges in some of these situations. This is what could risk exposing certain excessive operations in which it had engaged. The awareness of such a possibility would help to moderate the initial impulse to overreach.

A purely intelligence-gathering agency has less incentive to be concerned about the appearance of propriety. In short, such an agency does not as readily expect to be found out. This is not to say, of course, that such improprieties do not occur within the framework of law enforcement operations. Obviously, they have. The RCMP itself provides a telling example. Our point simply is that, as between a law enforcement and an intelligence gathering operation, the latter is more likely to attract such troubles because it has less motivation to avoid them.

The propensity to target the wrong people is a particular danger that would more likely inhere in a purely intelligence-gathering exercise. Since the goal of an intelligence investigation is to assess, understand, and predict, the idea is to learn as much as possible. Hence, the tendency to investigate an excessive number of people. Moreover, the idea is to discover almost everything there is to know about the targets, including their most intimate habits and beliefs. Hence, the tendency to investigate an excessive number of activities.

Another advantage in housing intelligence collection and law enforcement in

the same agency concerns the prospect that the culture of one could help to influence that of the other. By contrast to an intelligence investigation, a law enforcement investigation is a more limited exercise. It is designed essentially to collect evidence for the purpose of prosecution. Generally, its scope is limited to gathering evidence of crime and its duration is limited to the period before trial.

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 definable 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 definable matters. This is what could imperil legitimate dissent.

For all of these reasons, the law enforcement orientation is much less threatening to civil liberties than is the intelligence orientation. While cultural influences could work both ways, it would nevertheless be sensible to increase the opportunities for moderating influences to prevail.

Significantly, the revelations of abuses committed by the American FBI impelled the U.S. authorities, some years ago, to move in the diametrically opposite direction from what was done in Canada. Instead of creating an intelligence gathering agency divorced from law enforcement, the Americans 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 investigations as much as possible "like all other criminal cases". The narrower focus of criminal investigations was seen as less likely to intrude upon lawful dissent.

Although the FBI has undergone a number of re-organizations since the above amalgamation, the U.S. has never created a separate agency to handle the domestic intelligence work performed by the FBI. Even America's special 9/11 commission explicitly recommended *against* the creation of a "new domestic intelligence agency".

We appreciate the fact that not every investigation performed by a law enforcement agency can have a prosecutorial outcome or even purpose. But, whatever need there may be for flexibility, we believe it would be advantageous for the security intelligence agency to have law enforcement as well as intelligence collection functions. Even if there is often a need to focus on tactics other than prosecution, the fact that the agency may have to prosecute at some stage could diminish some of its propensities to take questionable shortcuts.

Accordingly, CCLA recommends that law enforcement be added to the functions of those who are involved in security intelligence. In advocating such a reform, we acknowledge that the separation proposed by the McDonald Commission appeared to have been influenced by the anticipated resistance of the RCMP to any progressive reform. It does not necessarily follow, however, that the RCMP would have to be involved in the kind of restructuring that we are recommending. Nor does it necessarily lie beyond

the wit of the Canadian political establishment to reorganize – or even transform - the RCMP itself.

We are also sensitive to the possibility that the auditing activities of the Security Intelligence Review Committee (SIRC) might well have improved the behaviour of CSIS over the years. Our point is that such behaviour might have been further improved by the addition of law enforcement responsibilities. Besides, there is no reason why some SIRC-style auditing could not be extended to any law enforcement agency involved in the activities of national security.

The reforms we are advocating could be achieved in different ways. Perhaps, for example, CSIS might acquire law enforcement duties 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 regular criminal investigations relating to such areas as customs, excise, and drug violations.

An alternative approach might entail leaving the domestic security work within a reorganized RCMP but, like the situation with the FBI, integrating it more fully with the criminal investigation branch. If that were done, CSIS would function only in a tightly defined area of counter intelligence and law enforcement against foreign-controlled security threats.

No doubt, there are additional structures that would accomplish the same objective. We are not now wedded to any one solution. Our objective here is simply to ensure that the collection of security intelligence is no longer divorced so completely from the job of law enforcement.

One of the reasons that the McDonald Commission favoured the creation of a separate intelligence gathering agency concerned the role of the relevant minister. The Commission believed that the government should play a more "hands on" role regarding the collection of intelligence than it does in the area of law enforcement. To this extent, the McDonald Commission reflected the conventional wisdom in this country according to which the relevant minister must adopt a more taboo approach with law enforcement. On this basis, the minister could issue broad policy directives to the police but not become involved in their day-to-day operations. The fear is that such governmental involvement would risk politicizing the police.

To be sure, this is a commendable caution. Suppose, however, the minister were to learn that a particular criminal investigation was targeting someone and using methods that the government considered unacceptable? It could well be that a broad policy directive issued thereafter would not be capable of providing sufficient redress. Without a clearly understood power to order that the police stop what they are doing, the minister's duty of accountability would be largely inadequate.

In any event, why should it be assumed that only the minister and the government have improper political motives? So do some police officials. And what about all the other prejudices that could shape police behaviour? It has been alleged, for example, that certain police operations have been influenced by racism or homophobia within the constabulary. As between the appointed police and the elected government, why should it be the police who have the right to make the last mistake? On this basis, we believe that there is a case for greater governmental involvement in both the law enforcement and security intelligence functions that are performed on its behalf.

With or without the other reforms we are recommending, it is essential that all of the national security activities of the government – law enforcement and intelligence gathering – be subjected to on-going, independent auditing of a kind that the Security Intelligence Review Committee (SIRC) now performs with respect to CSIS.

Since both civil liberties and the reduction of inter-agency rivalries would be the likely beneficiaries, it remains for us to urge a greater integration of the law enforcement and intelligence gathering functions. In combination with the extension of independent auditing, we believe the cause of both national security *and* personal liberty would be better served.

We hope the foregoing is of assistance to your deliberations. If it would be helpful, we would be pleased to meet with you either in public or private session. Thank you for considering our views.

Sincerely,

A. Alan Borovoy
General Counsel